IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 568

568

OSCAR R. EWING, Federal Security Administrator, et al.,
Appellants,

vs.

MYTINGER & CASSELBERRY, INC.
Appellee

BRIEF FOR THE APPELLEE

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STATEMENT

The leave to amend Appellee's complaint contained in Judge Pine's order of March 4, 1949 (R. 724) was not limited to "attack the constitutionality of Section 304(a) of the (Food, Drug and Cosmetic) Act"[1] an impression Appellants seek to convey on page 12 of their brief, but was leave to amend generally. Unfortunately the argument at the time the form of order was settled before Judge Pine on March 4 is not in the Record but the order certainly speaks for itself (R. 724). Appellee's amended complaint sets forth many additional acts of misapplication of the multiple seizure provisions to it by additional facts showing

[1] 52 Stat. 1040, 1044 (1938); 21 U. S. C. 301, 334(a).

arbitrary, capricious and oppressive acts as well as the claim that the multiple seizure provisions of the Act are unconstitutional as applied to Appellee.

Appellee disagrees with Appellants' statement in their brief of the facts of this Case. Appellants in their statement of facts to a great extent either state and rely upon testimony of their witnesses rejected by the Trial Court on the basis of its observation of the demeanor and veracity of witnesses on the stand or state facts not supported by the Record. The major misstatements are pointed out in the argument on the facts herein, although such misstatements are so numerous and so obvious at various points it would unduly prolong this brief to discuss them all. The Findings of Fact of the Trial Court are an accurate and concise statement of the facts herein and Appellee adopts them as its statement thereof (R. 756-770).

Appellee is not herein stating what it hopes to prove, as in the argument on the Petition for a Writ of Prohibition and/or Mandamus. Appellee has now proved all these facts and is here with findings showing all 3 trial Judges in unanimous agreement that such proof was made at the Trial.

QUESTIONS PRESENTED

Aside from jurisdictional and procedural questions raised by Appellants, the two major questions presented are:

(1) Were Appellants' actions herein authorized by the words contained in Section 304(a) of the Food, Drug and Cosmetic Act which read as follows:

> "That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

(2) If such actions were authorized by those words of that Section, does the section, as thus construed, violate the due process clause of the Fifth Amendment of the Constitution of the United States?

SUMMARY OF ARGUMENT

I

Appellants acted arbitrarily, capriciously and oppressively in making their determinations authorizing multiple seizures without reading pamphlets they found to be misleading in a material respect to the injury or damage of the purchaser or consumer; without considering facts in official surveys in their files compiled pursuant to the statute and favorable to Appellee showing that purchasers and consumers under customary conditions of purchase and use did not conclude that Appellee's pamphlets are misleading (*Kwock Jan Fat* v. *White*, 253 U. S. 454, 464, *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 338-339); with *no* facts or complaints before them showing injury or damage to any purchaser or consumer from Appellee's labeling or its product (the statute requires that such determinations be based on "facts found," Cf. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91); by deliberately planning their 11 seizures on a far-flung nationwide geographic pattern with a time schedule designed to inflict the greatest possible punishment (Cf. Mr. Justice Brandeis' dissent in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 433) by injury to Appellee's business reputation; by planning seizures to keep "pressure" on Appellee (as outlined in Appellants' "Pressure" memorandum) until the injunction herein (evidently anticipated by them) was granted; by acting secretly *ex parte* to uphold prior unlawful decisions of subordinates through consideration of their biased views only; by rejecting Appellee's two requests for an opportunity to present the true facts when no emergency or situation of compelling public interest required summary action; and by doing all the other unfair and unreasonable acts set forth in the Findings of Fact herein.

II

There are four separate and distinct provisions of the Act which are not questioned here under which multiple seizures of products may be made when there is a charge of (1) adulteration, (2) danger to health, (3) fraudulent labeling, or (4) where a prior judgment condemning the particular labeling has been obtained. The provision authorizing multiple seizures in exceptional circumstances when labeling is misleading was not intended to apply to factual situations like that involved in the instant case. The Congress never intended to authorize what Appellants have done here. *Waite* v. *Macy*, 246 U. S. 606, 608-609; *Gegiow* v. *Uhl*, 239 U. S. 3, 10. Appellants did not comply with the statute by acting in the manner referred to in Part One of this Summary of Argument, the decision makers did not act as reasonable men and therefore did not have probable cause to believe Appellee's labeling misleading, and their decisions are void on their face. Appellants made their authorizing decisions and secured the embargoes for punishment purposes rather than protection of the public. Appellants' actions therefore violate the statute's mandate.

III

A trial of the issues involved in any one of the libel seizure actions in a libel court offers no remedy against Appellants' arbitrary, capricious and oppressive actions herein because: (1) libel courts have no jurisdiction over Appellants in their individual capacities; (2) a libel court cannot stay further seizures *pendente lite* and Appellants could ruin Appellee almost overnight by carrying out their "Pressure" memorandum scheme of making seizures by use of mimeographed forms and telegraphed instructions against which plan consolidation for one trial is no remedy as it is the *seizures* and not the trial which causes the irreparable injury; also, further seizures would be made by Appellants while the cases are being consolidated and tried

and the libel court cannot stop seizures during all of that time. Appellants have used delaying tactics to prevent consolidation and trial of any of the libel actions herein so they could carry out their "pressure" punishment plans until an injunction is granted in the instant case or the indictment trial is held in California; (3) the libel courts *can never* consider whether the determinations authorizing multiple seizures were made arbitrarily, capriciously and oppressively, as the only issue before those courts is whether labeling is "misleading in any particular." This means that never in a libel court would there be any consideration of Appellants' actions herein or relief against such action regardless of how illegal or unfair they are; (4) libel courts cannot stop damage *pendente lite* or give relief for damages suffered; and (5) there is no way the libel courts can avoid a multiplicity of actions. (6) The hearing in the libel court does not offer a remedy which protects Appellee's constitutional rights under the facts herein.

IV

The Administrative Procedure Act provides a review of the six determinations authorizing multiple seizures because such determinations are final decisions in every respect on the authorization of the use of multiple seizures, and such authorization is not an issue which can be tried in the libel courts. Without such authorizing decisions more than one seizure cannot be made. Also, contrary to Appellants' contention, the Court as a court of equity had jurisdiction to determine whether public officials, like Appellants, have acted unlawfully. *Garfield* v. *Goldsby*, 211 U. S. 249, 262. Further, and also contrary to Appellants' contentions, the legislative history specifically indicates that equity courts were intended to have their traditional jurisdiction to stop illegal action under Section 304(a). This is made clear in a Congressional report *not* quoted by Appellants in their brief. The three-judge court statute gave

the Trial Court jurisdiction to decide all issues involved in the case "in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties." *Public Service Commission* v. *Brashear, Freight Lines,* 312 U. S. 621, 625; *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175. The text of the statute, its legislative history, and decisions of this Court so hold. Therefore, the Trial Court had jurisdiction to determine the ancillary issue of whether Appellee's pamphlets violated the Act. Such an issue is not confined by the statutory scheme to libel courts as the statute contains no such confining language. Federal courts considering injunction and criminal actions are intended to have jurisdiction to pass on the same issue and courts considering issues in other types of litigation are not prohibited (as they were, for example, in the price and rent control statute) from deciding such an issue if it is involved in the litigation as in the instant case. Appellants' entire defense was in fact based on that issue. Both parties presented their full cases on the issue and Appellants lost as all they presented was the biased opinions of the decision makers while Appellee offered evidence of the impressions of purchasers and consumers *compiled by Appellants* which refuted Appellants' opinions. "A court of equity ought to do justice completely and not by halves . . . a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that would not otherwise be within the range of its authority." *Camp* v. *Boyd,* 229 U. S. 530, 551-552; ". . . it should dispose of the entire case and its incidents, and not remit any part of it to a court of law." *Greene* v. *Louisville & I. R. Co.,* 244 U. S. 499, 520; ". . . where, as here, the equitable jurisdiction of the Court has been properly invoked for injunctive purposes, the Court has power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which

might be conferred by a court of law." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 399.

V

If the words "without hearing" or any other language contained in Section 304(a) under which Appellants claim their action herein is authorized, is construed as giving authority to do the arbitrary, capricious and oppressive actions complained of, that Section as thus applied to Appellee violates the due process clause of the Fifth Amendment of the Constitution of the United States. In the absence of an emergency or a situation of compelling public necessity requiring immediate action, Appellee may not be deprived of its property and irreparably injured in its business reputation and good will without a hearing containing an opportunity to present its facts showing the deprivation and other injury is unlawful. Appellants' actions in this case demonstrate a lack of that fundamental fairness required by the due process clause, so if the language questioned really authorizes what Appellants have done it violates that clause.

ARGUMENT

1. The Nature of the Appellee's Product and Business

Appellee is the exclusive national distributor of a vitamin product known as "Nutrilite Food Supplement," consisting of 16 vitamins and minerals formulated in a base prepared from extracts of alfalfa, parsley and watercress (R. 757, Plaintiff's Ex. 8, R. 54-55, on file with clerk). This food supplement is sold to consumers on the basis that ordinary diets are deficient in vitamins and minerals and Nutrilite will help make up such deficiencies (R. 758-759). It is the unique base of alfalfa, parsley and watercress which sets Nutrilite apart from all other vitamin and mineral products (R. 131, 163-164, 1182). This base is formulated by a process whereby one ton of alfalfa, parsley and watercress is reduced to approximately 4 to 10 pounds of this base (R. 55). The base contains vitamins and minerals known as "trace" elements which have not yet been fully identified by the scientific research in the field but these elements are known to be essential and beneficial to human nutrition (R. 131-132, 163-164, 480).

Nutrilite contains no substances or materials or combination of substances and materials harmful or detrimental in any manner to human users (Complaint and Answer Par. 4, 726, 749). Nutrilite does contain substances and materials which have been demonstrated by scientific tests and by actual experience of users to be beneficial to the health of human beings and Appellants admit that Nutrilite is harmless (R. 749) and that its vitamin and mineral contents are valuable in preventing those vitamin and mineral deficiencies in the diet of human beings (R. 275). No claim has ever been made by any Federal, state or other governmental agency that Nutrilite is adulterated or harmful in any manner to the health of the users thereof (R. 55, 757).

The need for the addition of vitamins and minerals to the diet flows from absence of these food factors in the

diet due to depleted soils and the canning and refining processes whereby the vitamins and minerals are taken out of ordinary foods (R. 74). This Court has had occasion to consider the development of enriched foods and the reasons therefor in other cases.[2] So well established are these facts that Counsel for Appellants advised the trial court that the efficacy of vitamins and minerals is not involved in this case (R. 49, 51, 54-55, 80-81, 286), for Appellant's admissions had foreclosed any contrary position (R. 274-283). Appellant's brief states: "There was agreement that Nutrilite and vitamin products generally would be useful in helping persons suffering from dietary deficiency resulting from insufficient vitamins." (p. 79).

The product now sold as Nutrilite was first manufactured in California in 1933 (R. 56) and the great bulk of the product is now and always has been sold in California. There

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[2] See the Findings of Fact of the Federal Security Administrator appearing in the Transcript of Record in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 224-225. The following findings appear on page 617 of the Transcript of Record:

> "33. Recent investigations of the diets of persons in various sections and in various income groups have shown that in many cases the food consumed does not furnish sufficient amounts of certain necessary nurtitional elements to maintain health. The deficiencies are more prevalent in the case of persons with low incomes. Such persons usually supply a larger part of their energy requirements from flour and self-rising flour than the average person because of the cheapness as a source of energy.
>
> "34. Among the most serious and widespread deficiencies, in children as well as in adults, are those of vitamin B_1, riboflavin, nicotinic acid, and iron. Deficiencies of these vitamins tend to occur in the same individuals.
>
> "35. A deficiency of calcium exists in certain groups of the population. A deficiency of vitamin D exists in large numbers of infants and children."

Nutrilite contains all these elements and all others found to be beneficial in human nutrition in the amounts recommended by the National Research Council—the admitted authority in this field—and experts on the subject (R. 131-132, 163-164, 757).

are now more than 5,000 persons engaged in the distribution of the product throughout the Nation (R. 56, 1030, 66) and sales exceeded $500,000 per month prior to Appellants' multiple seizures of the product (Pl. Ex. 14, R. 1029, 66).

2. No Attack Here on High Purposes of Food, Drug and Cosmetic Statute—Act Has Four Other and Separate Multiple Seizure Provisions Not Affected by Seizure Provision Involved in This Case—Constitutional Issue Narrowly Confined to Unique Facts

At the very outset, Appellee wants to make it clear that its attack is not upon, and it does not here seek to frustrate or obstruct, the high purposes of the Food, Drug and Cosmetic Act of 1938. The attack herein on illegal action of Appellants if sustained on the unique and unusual facts of this case, which are contained in the Findings of Fact of the Trial Court will not lessen the public protection intended by the Act. Such shocking facts as condemnation without reading,[3] action admittedly with no facts when action must be based on "facts found" and the other unusual facts herein will probably never reappear in any future case.

Appellee's constitutional attack is a narrow one directed to about 50 words of the Act composing a minor part of one section thereof as applied to Appellee under the unique facts herein. If the decision upholding the attack on the arbitrary, capricious, oppressive and unlawful acts of Appellants is sustained, the Constitutional question is thereby avoided.[4]

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[3] Items 4, 5 and 6 *infra* page 15.

[4] *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Crowell* v. *Benson*, 285 U. S. 22, 62; *Brandeis J.* dissenting in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348; *Ex parte Endo*, 323 U. S. 283, 299-300; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129, 136-137; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568 *et seq.*

The constitutional issue is confined specifically to the facts [5] of this case (the major 22 actions complained of are set forth in the next section herein) and if decided in Appellee's favor it will also not lessen the protection of the public intended by the Act. The statutory language herein questioned and the Constitution do not confer upon Apellants the right to make unlimited seizures of Appellee's product. All powers of Appellants, if any, flow from the "exception" in Section 304(a) of the Food, Drug and Cosmetic Act allowing multiple seizures under *exceptional* circumstances.

Four provisions of Section 304(a) of the Act *which are not involved in this case* allow multiple seizures to protect the public in cases where products are (1) adulterated, (2) sold under labeling previously condemned by a Federal Court, (3) dangerous to health, or (4) sold under fraudulent labeling. The issues herein are thus narrowed to the following provisions of the Act as applied [6] to Appellee under the unique facts of this case: [7]

> "(2) When the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that . . . the labeling of the misbranded article is . . . or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

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[5] This Court has repeatedly referred to the helpfulness of a full development of the facts in determining constitutional issues. *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, 548; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547-548. Read, *The Consideration of Facts in Due Process Cases*, (1930) 30 Col. L. Rev. 360.

[6] Cf. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 601-602.

[7] Although Appellee does not ask that this provision be held invalid on its face, the separability section of this Act (Sec. 901) leaves the balance of the Act unaffected in such cases. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 434.

Appellants justify their actions upon the "misleading" labeling charge only and Appellee's product is (1) *not* adulterated, (2) there is *no* prior judgment, (3) the article is *not* dangerous to health and (4) its labeling is *not* fraudulent.

If the statutory language here questioned authorized Appellants to do the arbitrary, capricious and oppressive acts revealed by the findings of fact herein, then it is Appellee's position that these few statutory words violate every idea of fundamental fairness for which the due process clause stands. Appellants, in effect, contend this statute allows them to exercise uncontrolled and uncontrollable arbitrary, capricious and oppressive power because it happens to have the unusual words "without hearing" as part of its text. If the statute really does that, because of those or any other words it contains, it is Appellee's position that the due process clause offers Appellee a constitutional protection paramount to any such power Appellants can acquire by the statutory provisions here involved.

3. The 22 Major Arbitrary, Capricious and Oppressive Acts of Appellants

Since the Appellee's whole case turns on whether Appellants violated the statutory words here involved by a series of arbitrary, capricious, oppressive and unlawful acts, or whether those statutory words are unconstitutional because they authorize such acts, it is deemed advisable at the outset to state 22 of the major acts of Appellants complained of while at the same time referring to the Findings of Fact and the 25 items set forth, *infra*, pp. 24-26 which give other acts almost equally unjust and unfair. The 22 are:

1. Deliberately planned and executed the seizures of Appellee's product in the following nationwide geographic pattern and time schedule (R. 729-751):

Belleville, New Jersey	October 6, 1948
New York, New York	October 19, 1948

Buffalo, New York	October 28, 1948
Hastings, Nebraska	December 1, 1948
Belleville, New Jersey	December 15, 1948
Spokane, Washington	December 23, 1948
Seattle, Washington	December 30, 1948
Clarkfield, Minnesota	December 31, 1948
St. Petersburg, Florida	January 4, 1949
Chicago, Illinois	January 3 and 4, 1949

with each seizure designed to inflict the greatest possible publicity punishment upon Appellee, knowing full well that because of the issues in each being the same the Appellee has a right to consolidate the seizures for trial into one case so punishment would be the only result of each seizure beyond the first.[8]

2. Each of the six decisions authorizing multiple seizures on the ground that the labeling *"is" or* "would be" misleading *in a material respect* to the "injury" *or* "damage" of purchasers and consumers,[9] was made with *no* facts showing "injury" or "damage" to *any* purchaser, user, or consumer from Nutrilite or its labeling.[10]

3. The decision makers had no facts before them showing *one* complaint from any purchaser or consumer,[11] although prior to the decisions Appellants conducted one of the most searching investigations

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[8] Finding 22, R. 763-764; Finding 39, R. 769. (Never *once* in their brief do Appellants mention the geographic location of the eleven seizures.)

[9] Each of the 6 decisions conclude: ". . . there is probable cause for me to believe and I do believe, that the labeling of this article *would be and is* in a material respect misleading to the injury *or* damage of the purchaser or consumer." (Italics supplied.) R. 1172, 1174, 1218, 1534, 1535, 1541. Not once do Appellants in their brief mention the very highly important verb "is"—they avoid it for the obvious reason that they know this lack of facts indicates extreme capricious action. The alternative finding of "injury" or "damage" has not been explained by Appellants.

[10] Finding 17, R. 761, Crawford; Finding 29, R. 765, Larrick; Finding 30, R. 765, Dunbar; Finding 35, R. 767-768, Kingsley; R. 532, (Item 6).

[11] *Ibid.*

ever made in this Nation, of Appellee, its distributors and its customers—interrogating the latter admittedly "unreasonably." [12]

4. Concluded multiple seizures should be made of Nutrilite upon the 58 page pamphlet after reading *only* the last 20 pages of the pamphlet.[13]

5. Concluded the 42 page pamphlet was misleading after reading only the parts pointed out by the author of the famous (in this case) "pressure" memorandum.[14]

6. Read but *one* unidentified pamphlet but signed decisions concluding that *three* involved herein were all misleading.[15]

7. Made 5 of 6 decisions after completion of an official Food and Drug Administration survey of purchasers and consumers to determine their impression of Appellee's pamphlets but refused or failed to consider findings of that survey which were 100% contrary to all six decisions and to the contentions of all the libel papers.[16]

8. Made all 6 decisions and did their other acts herein knowing that Nutrilite is beneficial and harmless,[17] that its label complied with the law,[18] and that there was no question of adulteration, danger to health or fraudulent labeling and that no prior judgment against Appellee's labeling had been rendered in any court.[19]

9. Rejected Appellee's two specific requests for an opportunity to present the true facts, listened only to biased subordinates bent on defending their prior decisions, and their counsel (R. 503), and backed up these subordinates' decisions by signing decisions identical

[12] R. 532, Item 9 (offered by Appellants as a part of *their* own evidence, R. 531). See *infra* pages 24-27.

[13] Finding 17, R. 761, R. 384-385.

[14] Finding 30, R. 765. Finding 32, R. 766-767. Text of "Pressure memorandum," R. 1030 a, 67; admission it states true facts, R. 413.

[15] Finding 35(b), R. 767.

[16] Plaintiff's Exhibit 4, R. 929-937, 38-47, Finding 30, R. 765, Finding 35(b), R. 767.

[17] Findings 4, 5, 12, R. 757-759.

[18] Finding 6, R. 757, Defendant's admission, R. 273-274.

[19] Finding 12(f), R. 759-760.

therewith knowing the disastrous effect of such action[20] and knowing no emergency existed requiring this refusal to talk to Appellee.[21]

10. Refused to talk to Appellee about its labeling until *all* litigation completed;[22] thereby offering Appellee as the only course of action it could take, the fighting of a multiplicity of actions or closing down of a business upon which more than 5,000 persons depend for their livelihood and stopping the sale of a product which thousands obviously find beneficial or they would not buy it.

11. Made their decisions authorizing multiple seizures in furtherance of a plan to keep a sustained pressure on Appellee and to inflict punishment rather than to protect the public.[23]

12. Unleashed their terrific nationwide far-flung geographic plan of multiple seizures[24] without notice or warning when Appellee's product and labeling had been under Appellants' surveillance since 1939.[25]

13. Arrogantly brushed aside and ignored Appellee's good faith requests for an opportunity to correct any labeling which Appellants might question.[26]

14. Kept their decisions authorizing multiple seizures secret from Appellee to prevent discovery that the first three were unlawfully made.[27]

15. Claimed to have relied upon a psychiatrist for medical "facts" knowing he was unqualified in the field of vitamins and minerals, this man's lack of qualifications being openly admitted by Appellants' refusal to call him as a witness in the trial despite repeated warnings by the Trial Court that an unfavorable inference would be drawn from such refusal.[28]

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[20] Finding 35(d), R. 767-768.

[21] Finding 42, R. 770.

[22] Finding 40, R. 769, R. 419-421, 534 item 25.

[23] Plaintiff's Ex. 16. Text of "pressure" memorandum outlining this scheme R. 1030(a), 67, 69; admitted to be true R. 413.

[24] See *supra* pp. 63-64.

[25] Finding 8, R. 757.

[26] Finding 13, R. 760; Finding 20, R. 763; Finding 29, R. 765.

[27] Finding 34, R. 767 on decisions unlawful; Finding 17, R. 761; Finding 29, R. 765; Finding 30, R. 766 on findings kept secret.

[28] Finding 18, R. 761-762.

16. Deliberately violated an agreement to make no further seizures in exchange for a continuance in the indictment case.[29]

17. Gave "untrue information"[30] to secure embargoes upon Appellee's product in widely scattered parts of the United States, said embargoes being deliberately planned to inflict the maximum irreparable injury and damage.[31]

18. Gave unfavorable opinions and injurious information to private persons and organizations concerning Appellants' actions against Appellee.[32]

19. Unreasonably volunteered information to magazines and newspapers in a way which would most injuriously damage Appellee.[33]

20. Made deliberate efforts to have seized only "large" shipments of Appellee's product so as to make its losses as large as possible.[34]

21. Instituted seizure actions in places far removed from Appellee's principal place of business so as to necessitate the maximum amount of expense in defending and consolidating said actions, and also to prevent a trial in Los Angeles of their charges.[35]

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[29] Finding 24, R. 764 and R. 533 item (15) offered in evidence by Defendants at R. 531. See also R. 264-266.

[30] R. 533, item (11), offered as Defendants' evidence, R. 531.

[31] Finding 38, R. 769, R. 533 item (10).

[32] Finding 39, R. 769, R. 533 item (17).

[33] *Ibid*, item (18).

[34] R. 533, item (20).

[35] Finding 22, R. 763-764; Finding 37, R. 768; Finding 39, R. 769. It was only on Sept. 22, 1949, when they decided their obstructive tactics on the motion to consolidate the libel actions were doomed to fail that they filed an injunction action in Los Angeles including the same issues as those in the libel cases. See *infra* page 88. Appellant's claim on pages 75-76 of their brief that the instant case prevented a trial by jury obviously indicates they never intended to try this Los Angeles injunction as that action is under Section 302(a) of the Act which unlike the section on libel courts (304(b)) does not provide for a jury trial. On appellant's stalling and delaying tactics see *infra* page 83-88. Contrary to what Appellant's say (p. 65 brief) the removal motion also asked for trial in a district of "reasonable proximity" to Appellee's principal place of business—the statutory language (R. 1042-1058).

22. Gave instructions that the Buffalo seizure action be moved no closer to Appellee's principal place of business in California than the Midwest,[36] and throughout all the litigation carried out a deliberate plan of avoiding, in any of the litigation, a trial of the merits of the charges against Appellee's labeling.[37]

In their brief Appellants do not pretend to defend or explain these 22 actions and the innumerable other unfair and unjustifiable actions they have carried out against Appellee, all as set forth in the Findings of Fact of the Trial Court, *because they have no defense.*[38] Nearly every one of the findings on these actions is on *uncontradicted* evidence, evidence offered by Appellants, or *admissions of* Appellants. As explained *infra* pp. 30-33, Appellants devote most of their brief, as they did their evidence at the trial, to the ancillary issue of Appellee's labeling rather

[36] R. 533, item (16).

[37] Finding 24, R. 764, Finding 32(c), R. 767. The pressure memorandum shows no interest in actual trial of any libel case (consolidated or otherwise) as it mentions only the criminal case and the instant injunction action and does not mention any trial of the libel cases (R. 67, 1030A, 69).

[38] This Court in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, held at the Government's urging that evidence of activities both prior and subsequent to a particular transaction in question may be relevant as reasonably tending to show the purpose and character of particular transactions under scrutiny. It was stated by this Court at page 705:

> "The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purposes and character of particular transactions under scrutiny."

Appellants' actions both prior and subsequent to their decisions are thus relevant as they show the purpose and character of the decisions.

than to the issues raised by these 22 actions. They do argue on the law that the Court had no jurisdiction to protect Appellee against such acts.

4. The Trial—Nearly Every Question of Fact Foreclosed Against Appellants by Discovery and Admissions —Unusual Offer by Appellants of Damaging Facts Against Themselves

Appellants seem to think it indicates weakness in Appellee's case to say that it was composed largely of admissions and papers from Appellants' records. (P. 14, Appellant's Brief). As disclosed by the Record herein, prior to the trial herein, Appellee, made extensive use under the Federal Rules of Civil Procedure of (1) depositions, (2) interrogatories, (3) requests for admissions, and (4) other discovery processes to develop every fact known to Appellants. All of this process was bitterly fought by Appellants (R. 11-22, 286, 669-680, 746, 747) but in the end most of the information was ordered produced by the Court. And the record also shows that Appellee used only a small portion of the great volume of depositions, interrogatories, admissions and documents. Appellee needed to use only a small portion of each to prove its case and carefully selected the parts essential to its case in the interest of conserving the time of the Court by eliminating non-essential evidence. Appellee is proud of the fact that Appellee's case is made up almost entirely of admissions by and documents received from Appellants. Such action by Appellee is believed to be the very purpose contemplated by the Federal Rules of Civil Procedure. Many other admissions are made in Appellants' answer (R. 748-753) to the complaint (R. 725-737), such as in paragraph 18 (a) the 2 requests for a hearing (R. 732) and denial thereof (R. 752).

The surveys of purchasers and consumers under ordinary conditions of purchase and use (R. 929-939, 38) which came from Appellants' own files, constituted a direct con-

tradiction of the chief objection raised by Appellants to Appellee's advertising pamphlets. It was from Appellants' own lips that the admissions were wrung most reluctantly that they made their decisions authorizing multiple seizures with not one fact before them showing injury or damage to any person, no complaints from any person,[39] and that the "pressure" memorandum stated true facts (R. 413).

Appellants based their entire case upon certain findings which they claimed a psychiatrist Dr. Butz had made (R. 333-334, 395, 315, 505). They then advised the Court that they *would not* call Butz as a witness (R. 391-392) although his address is given in a deposition taken for discovery purposes as Silver Spring, Maryland (R. 1175), and they did not say that he was unavailable to them as a witness. Appellants' other most essential witness was the Acting Administrator of the Federal Security Agency, J. D. Kingsley, who made the last three (and only presently effective) decisions authorizing multiple seizures (R. 1532-1541), and under which Appellants threaten to make further seizures. But Kingsley was not called as a witness and was not claimed to be unavailable to Appellants, although he had given an incomplete deposition and had said he did not know just which "version" of the Appellee's pamphlets he read before making the three decisions condemning three different pamphlets but he read only one version (R. 504, 505, 512-513).

Because of the admissions, and the unusual action referred to shortly wherein Appellants offered many facts against themselves, Appellee offered only four of the 17 witnesses whom it advised Appellants it might call.[40] William S. Casselberry, President of Appellee, gave a detailed account of contacts between Appellee and Appellants, together with an outline of the care with which the pamphlets

[39] R. 269-270, 271, 329-330, 385, 507.

[40] R. 532. Question 10, answered R. 535, item 10.

condemned by Appellants were prepared (R. 28-72). Dr. John A. Myers of Baltimore, a specialist in vitamin, mineral and nutritional subjects, then gave expert testimony supporting all of the statements contained in the pamphlets as true, accurate and not misleading from a medical viewpoint (R. 72-91). Mr. Roger A. Truesdail, an expert chemist, then gave his opinion (R. 283-286) that the product held by Appellants would be unsalable when returned to Appellee because of deterioration in potency of some of the contents (R. 286). Mr. Lee J. Myers, a member of the bar of California and an attorney whom the Appellants refer to as an expert specialist in this field, (R. 1026, 1029, 65, 269) then gave his opinion that from a legal viewpoint the pamphlets complied in every respect with the Act. (R. 247-267). His background and experience are of such a nature that he was as well qualified as Dunbar, Larrick, Crawford and Kingsley to give an opinion on the character of Appellee's labeling. He is the attorney who supervised the rewriting of the pamphlets and who repeatedly asked Appellants to tell him if they found anything wrong with the pamphlets so that it might be corrected (R. 1026, 64-65).

The Findings of Fact set forth the foregoing so concisely that it is believed unnecessary to go into more detail about Appellee's evidence and Appellants' many other admissions.

The Appellants' witnesses were so confined in their testimony by the admissions previously referred to that the testimony of Appellants Dunbar, Crawford and Larrick merely reiterated what they read, *or failed to read,* in making their decisions authorizing multiple seizures, and the facts surrounding the making of their decisions already referred to herein. See *supra* pages 13 to 18. On the medical side, Appellants called Dr. Jeghers, whose testimony was so in favor of Appellee's position that Appellants then sought other medical testimony. He agreed (R. 368) that Dr. Wilder of Mayo Clinic, who has written much

that confirms what Appellee says in its pamphlets, (R. 957-958, 50-51) is an expert in this field (R. 957-958) thus contradicting Dr. Nelson, another of Appellants' witnesses. (R. 495, 1509).[41] Appellants' next witness was Dr. Blankenhorn. When counsel for Appellants asked questions about the statements in the so-called findings of fact attributed by Appellants to Butz, Dr. Blankenhorn created a major explosion in the courtroom by saying he could not answer the questions yes or no in the way Appellants' Counsel wanted him to (R. 438). Appellants then immediately took Dr. Blankenhorn off the stand in great consternation and confusion (R. 438).

Appellant's final medical witness was Dr. Walter K. Myers (it is only fair to advise the Court that none of the three Myers who testified in this case are believed to be either related or acquainted in any way). He testified that Counsel for the Appellants told him Nutrilite "was being sold with a claim for curing the disorders that have been mentioned." (R. 479). Those mentioned were the ones listed in the findings attributed to Butz (R. 472-478). Apparently deciding that this gave a bad impression, he then said that he got some of his information from his patients and from advertisements of Nutrilite which he had seen in newspapers and magazines. (R. 483). When confronted with the fact that Nutrilite has never been advertised in any newspaper or magazine he, in an embarrassment obvious from the record, said he would have to change his testimony as he had seen no advertisements. (R. 484).

The final witness for Appellants was a Dr. Nelson, a chemist, not an M.D., and head of the vitamin division of the Food and Drug Administration. He first admitted that his attention was initially called to Nutrilite by the American Medical Association and then sought to change his story on this. (R. 1502, 499-500.) Evidently the Appellants placed no reliance upon him themselves, because he testified that

[41] Nelson there testified that Wilder was unqualified.

none of them consulted him before they made their decisions condemning the pamphlets herein (R. 500), although such questions normally came under his jurisdiction (R. 1496). He had to admit that he had given an *untrue* statement *under oath in this case* in support of Appellants' motion to dismiss when he had said that the value of Vitamin K had not been established (R. 490-491). As already stated, he disagreed with Appellants' witness Dr. Jeghers about the qualifications of Dr. Wilder of Mayo Clinic as an expert in the field of vitamins and minerals, and disagreed with the outstanding expert in the United States on the mineral content of soils as affecting mineral content of plants (R. 498).[41] In general his testimony was such that in view of his admitted untruth when trying to help Appellants to get Appellee's complaint dismissed, the Appellee asked the Court to disregard his entire testimony.

Another remarkable thing about the trial, other than Appellant's failure to call Butz and Kingsley, was the fact that Butz named four medical doctors with whom he consulted in the Food and Drug Administration about vitamins and minerals (R. 1179-1180) (but not about Nutrilite), and none of these "experts" were called by Appellants.

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[41] Further evidence refuting Dr. Nelson's testimony that mineral content of soil does not affect mineral content of plants is found in an article entitled "Home on the Grapefruit Range" in the February, 1950, issue of READER'S DIGEST, where the following statement appears:

> "One last problem remained. Even in fertile Florida, where all you have to do is drop a seed and leap out of the way, there were green pastures where cattle stayed skinny and a lot of them starved to death. Scientists of the state university's Agricultural Experiment Station studied grasses and soils from such pastures and discovered that they lacked essential body-building minerals. When the scientists added iron, copper sulphate and cobalt to the diet of the sick and starving cows, the cows got well. Today minerals are mixed with the seeds of new tropical grasses and sprinkled from airplanes over miles of freshly cleared land. Grasses thus grown contain the minerals."

The most astonishing phase of the trial, however, was *Appellants'* action in closing their case by offering in evidence 25 separate items of arbitrary conduct compiled by Appellee prior to the trial as an answer to an interrogatory (R. 531-535). This evidence—all most damningly against Appellants—having been most amazingly offered by them is certainly evidence for all purposes in this case and having offered it Appellants must admit it is true as they offered nothing to contradict one word of it. This evidence states that Appellants acted arbitrary, unlawfully, oppressively, unreasonably, in excess of their powers under the Food, Drug and Cosmetic Act, and for the purposes of harassment, by the following:

"(1) The rendering of three secret unlawful decisions in September and December 1948, that the labeling of plaintiff's product was misleading;

(2) The carefully concealed fact from plaintiff that such secret decisions had been unlawfully made by the defendants, such fact being first revealed to plaintiff on January 17, 1949;

(3) The inflicting of irreparable injury on plaintiff by such decisions;

(4) The deliberate increase in plaintiff's irreparable losses by the unreasonable failure to procure the dismissal of all but the first libel for condemnation or seizure action after all but the first thereof had been judicially declared void and illegal;

(5) The denial by the Acting Administrator of the Federal Security Agency of plaintiff's requests for opportunities to be heard upon the question of whether the labeling of plaintiff's product is misleading in a material respect, to the injury or damage of purchasers or consumers;

(6) The further rendering *ex parte* by the Acting Administrator of the Federal Security Agency of unlawful decisions that the labeling of plaintiff's product is misleading, to the injury or damage of the purchaser or consumer where no facts exist which show that such was, in fact, the case;

(7) The rendering of such *ex parte* decisions by the

Acting Administrator of the Federal Security Agency that the labeling of plaintiff's product was misleading, with full knowledge of the total and ruinous consequences to plaintiff of such decisions;

(8) The deliberate and arbitrary refusal of defendants to stipulate to the removal of the pending libel for condemnation or seizure actions to the district in which plaintiff does business;

(9) The unreasonable interrogation by defendants, or their agents and employees, of many of plaintiff's distributors and customers with the resulting damage to plaintiff's business and good will thereof and interference with and retardation of the efficiency and morale of plaintiff's sales and distribution organization.

(10) The placing, or causing to be placed, of embargoes upon plaintiff's product in widely scattered jurisdictions of the United States so deliberately planned and calculated as to injure plaintiff;

(11) The giving of untrue information to secure said embargoes;

(12) The carefully designed geographic pattern of the libel seizure actions so as to unnecessarily punish plaintiff;

(13) The deliberate and unnecessary punishment of plaintiff by inflicting unnecessary expense through the institution of numerous libel for condemnation or seizure actions in widely separated and far-flung jurisdictions in the United States;

(14) The oppressive and unreasonable threats by defendants to institute still further libel seizure actions in other widely separated and far-flung jurisdictions in the United States;

(15) The deliberate violation of defendants' agreement not to make multiple seizures of plaintiff's product, upon the ground that such agreement only applied to seizures of plaintiff's product in Los Angeles;

(16) The issuance of instructions to allow the Buffalo seizure to be removed no further than the midwest;

(17) The rendering of opinions and the provision of unfavorable and injurious information by the defendants to private individuals and organizations with respect to the labeling of plaintiff's product, without either prior or subsequent notification to plaintiff;

(18) The unreasonable volunteering to magazines and newspapers of information in a way which would most injuriously damage plaintiff;

(19) The repeated violation of implied agreements to advise plaintiff of instances in which defendants deemed the labeling used by plaintiff to be in violation of the Federal Food, Drug, and Cosmetic Act and the regulations issued thereunder;

(20) The deliberate efforts of defendants to seize only 'large' amounts of shipments of plaintiff's product, so as to make plaintiff's losses as large as possible;

(21) The deliberate punishment of plaintiff by requiring the employment of attorneys and the provision of cost bonds in those far-flung jurisdictions in which seizures were made of plaintiff's product, knowing full well that plaintiff could consolidate all of such actions and the only accomplishment of said numerous actions would be the loss of such monies so expended by plaintiff;

(22) The secret infiltration of plaintiff's organization by defendants' agents and employees in entrapment attempts in order that information respecting plaintiff's operations might be constantly and instantly furnished defendants;

(23) The threat to incarcerate plaintiff's Seattle, Washington, distributor over the 1948-1949 New Year holiday if certain goods were not immediately produced by said distributor;

(24) The calculated action of defendants in refraining from instituting libel proceedings in the Southern District of California of products known to defendants to be in the possession of the Post Office Department and other common carriers for interstate shipment through which plaintiff was prevented from exercising its absolute right to remove the multiple seizure actions to such Southern District of California;

(25) The refusal and failure of defendants to indicate to plaintiff wherein the labeling of Nutrilite was claimed to be misleading, or to provide an opportunity to revise such labeling, all of which led plaintiff to the belief that the labeling was, in fact, acceptable to the Food and Drug Administration."

When Appellants closed their case with these 25 admissions Appellee called no rebuttal witnesses and immediately closed its case (R. 537).

Under these conditions is it any wonder that Appellants do *not* assert lack or insufficiency of evidence to support the Findings of Fact herein? They simply cannot do so.

5. Appellants' Own Investigations Reveal That Under Customary Conditions of Purchase and Use Purchasers and Users Are Not Misled by Appellee's Pamphlet

(a) The Statutory Test

The statutory test to be applied to Appellee's pamphlet—and this pamphlet constitutes the sole objection of Appellants to Appellee's business (Fdg. 7, R. 757, Fdg. 42, R. 770) is the interpretation placed upon it by purchasers and consumers under customary conditions of purchase and use.

Section 201 of the Act on the construction of labeling refers to "under such conditions of use as are customary or usual." Section 403 (f) refers to the requirement that labeling be in "such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use." Sections 503(c) and 602(c) contain identical language. Appellants Dunbar, Crawford and Larrick, and J. D. Kingsley, who acted for Appellant Ewing, all cited this as the test in making their claim that the pamphlets represented Nutrilite as a cure for serious diseases. (Crawford, R. 375; Dunbar, R. 311; Larrick, R. 395; Kingsley, R. 507). "In making that survey of labels (labeling) it is always my effort to place myself in the position of the individual who is going to read that label (labeling) and attempt to determine what impression . . . that labeling will make on the person—the customer or purchaser—who reads that label (labeling)" (Dunbar R. 310-311). The testimony of the others is in substance

the same as to the test of customer and purchaser reaction which must be applied.

Appellee has always contended that purchasers and consumers would not place the interpretation upon its pamphlets that Nutrilite is offered as a "cure" of diseases contended for by Appellants (Appellant's Brief 19, 20, 94). The pamphlets do no more than discuss diet and nutritional deficiencies due to the lack of vitamins and minerals in ordinary diets (Fdg. 12(e) R. 759). The chief causes of this deficiency are given as soil depletion and canning and refining processes (R. 908-911). The pamphlet then discusses the need to add a product like Nutrilite as a supplement to the diet to overcome these deficiencies of vitamins and minerals. Appellants ordered the Minnesota survey (R. 39-47, 929-939), already discussed herein, made for the specific statutory purpose of obtaining from purchasers and consumers their impressions of the pamphlets under customary conditions of purchase and use. Inspector Anderson of the Food and Drug Administration made the survey in Minnesota by talking to purchasers and users of Nutrilite who had bought the product after reading the pamphlet. The survey reveals that consumers unanimously reject the contention that Appellee's pamphlet is misleading to them (R. 929-939.)

(b) "None of Them Thought That Nutrilite Was a Cure for Anything But Merely Vitamins and Minerals Which Would Build Their Bodies Up"

This is what the official Inspector of the Food and Drug Administration reported back in part as to the impressions of purchasers and consumers of Appellee's product who read the pamphlet before buying the product (R. 40):

> "All people I talked to including Mr. Quale, the (Appellee's) Distributor, were very friendly and cooperative. None of them thought that Nutrilite was a cure for anything but merely vitamins and minerals

which build their bodies up. None of these people were the rabid health addicts that one so often comes into contact with in an investigation of this type."

Of one purchaser and user the Inspector reported (R. 42):

"She said at the time she signed up for the course Mr. Quale gave her the booklet, 'How to Get Well and Stay Well' and she had read this booklet and given it back to him. When she started using Nutrilite she did not think she was getting a cure. . . .

"I asked Mrs. West if she thought Nutrilite was a cure-all or something wonderful, and she said she believes it has helped her very much but does not know if it will cure anything. It would appear that Mr. Quale did not make any wild claims to Mrs. West and that she was not led to believe that the product was anything more than vitamins and minerals which would help to build her body up.

"James E. Anderson, Inspector."

The reports of other interviews with purchasers and consumers are of like import, all specifically refuting Appellants' "cure interpretation" opinions as each purchaser interviewed was specifically asked whether the pamphlet gave him the impression Nutrilite was a "cure" and all said *no* (R. 41-47).

If Appellants' "unreasonable"[42] interrogations of Appellee's customers and distributors and Appellants' other investigations (including "secret infiltration of Plaintiff's organization by Defendants' agents and employees in entrapment attempts in order that information respecting plaintiff's operations might be constantly and instantly furnished defendants")[43] described in the record had revealed any evidence disputing this Purchaser survey, it is a reasonable inference that after Appellee offered the Purchaser survey Appellants would have offered this other

[42] R. 532, item (9).

[43] R. 533-534, item (22)—admittedly true as Appellants themselves offered it in evidence (R. 531).

evidence to rebut the conclusions of their own Inspector. Cf. *Baltimore and Ohio R. Co.* v. *United States*, 298 U. S. 349, 381. If the Inspector could have cast doubt on his own report one can be sure Appellants would have had him testify.

We therefore have Appellants recognizing the test which should be applied to Appellee's labeling, applying that test and finding it against them, then arbitrarily and capriciously ignoring these facts in Appellee's favor—which were all the facts Appellants had—and ordering that havoc be wrought upon Appellee's business by oppressively carrying out multiple seizures of its product on a far-flung nation-wide basis.

6. The Appellants' Brief Chiefly Devoted to an Ancillary Issue Rather Than Main Issues in Case

In sum, the Appellants' brief argues that the statutory words here involved authorize them to do the "unfair," "drastic," "harsh" and "shocking" things they have done in this case,[*] but that the statute is nevertheless constitutional as the due process clause does not prohibit their unlawful, arbitrary, capricious and oppressive conduct thus allegedly authorized and set forth in detail in the Findings of Fact of the trial Court.

Appellants quarrel in substance with only one of the 43 Findings of Fact. The Finding singled out for special attention is No. 12 (R. 758-760) wherein the Court found that the three pamphlets involved in this case are not misleading, saying in part:

> "The beneficial effects of vitamins and minerals for nutritional deficiencies is a well established medical fact. Many of the statements in the pamphlet about the beneficial effects of particular vitamins and miner-

[*] The quoted words are those of Judge Pine. See Finding 34, R. 767.

als for nutritional deficiencies are confirmed by the admissions of the defendants herein (R 273-283).

"The three pamphlets (P's. Exs. No. 1, 2 and 3), when read as a whole and fairly interpreted, without lifting statements therein out of context, do no more than represent that Nutrilite is a vitamin-mineral food supplement designed and intended to build up the bodies of human users thereof in order that it may aid nature to help the users enjoy better health through better nutrition. Said pamphlets do not represent to the minds of ordinary, reasonable and prudent persons that all of the symptoms, conditions and diseases of the human body necessarily or generally result from dietary deficiencies alone, or that all of the symptoms, conditions and diseases of the human body can be prevented, cured or treated by the use of Nutrilite, and said pamphlets do not represent, suggest, or imply that Nutrilite is a medicine or drug, or that it is efficacious or beneficial in the prevention, treatment, or cure of all diseases.

"These pamphlets represent the product only as a food supplement containing vitamins and minerals beneficial to building up health and bodies and in alleviating, in some but not in all instances, symptoms resulting from vitamin and mineral deficiencies in the diet. Purchasers and consumers do not understand from these pamphlets that Nutrilite is a treatment or cure for any disease. The defendants' own survey to determine the impression gained by purchasers and consumers of the representations contained in these pamphlets under customary conditions of purchase and use reveals that the users interviewed uniformly came to these conclusions and understandings of the statements in the pamphlets."

Having devoted practically their whole case to an attempt to establish the contrary of these facts by opinion testimony, as compared with actual facts on consumer impressions offered by Appellee, and having lost on the merits, Appellants now say the trial court should not have con-

sidered and decided this matter as an incidental or ancillary issue to the two major issues in the case.

Appellants, knowing the findings of fact are all against them after a careful consideration of the evidence by the trial Court, from the outset to the end of their brief attempt to twist meanings of words, draw unfair inferences from words, excerpt phrases, parts of sentences and words out of their setting, argue that mere illustrations (clearly not intended otherwise) are unfair representations when a fair reading indicates the contrary,[45] and in general they attempt to mislead the Court into disagreeing with the Trial Court on the evidence on this one ancillary issue of the character of the pamphlets and attempt to get this Court to "try the case *de novo* on the record." *United States* v. *Yellow Cab Co.*, 70 Sup. Ct. 177 (Dec. 5, 1949). Never do Appellants, except in one little footnote,[46] admit that from their own files there came the most damning of evidence as to the *actual* reaction of consumers and purchasers to these pamphlets.[47] As explained *supra*, pp. 27-28, consumer reaction is the test whereby all such labeling is to be measured under the Act. Never do Appellants reveal in their brief that this official survey which *they ordered made pursuant to the statute*[48] proves that all their unfair arguments *are 100% wrong.*[49]

Under Rule 52 of the Federal Rules of Civil Procedure the Findings of Fact of the Trial Court should be upheld "unless clearly erroneous." *United States* v. *Yellow Cab*

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[45] See quoted part on their contention the product is sold as a cure for cancer, *infra*, pp. 42-43.

[46] Footnote 10, page 24, Appellants' brief.

[47] Plaintiffs' Exhibit 4, R. 38-47, 929-939.

[48] See *infra* page 54.

[49] See *infra*, "Who Is Acting Honestly, Fairly and in Good Faith in this Case?", p. 40.

Co., supra.[49a] Reference to the entire record herein shows only a rejection of unreasonable arguments and opinions of Appellants—not of any facts because all the facts are against them and the Court so found. And insofar as the merits of the pamphlets actually involved in this case are concerned, the Findings of Fact are in favor of Appellee by an acceptance of Appellee's testimony and a rejection of Appellants. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656, 659. Appellants offered *no* testimony to contradict their own survey of consumer reaction, just referred to,[50] so the only facts in the record were left uncontradictedly in Appellee's favor.

The Findings of Fact insofar as the arbitrary, capricious and oppressive conduct of Appellants is concerned are mainly based upon *uncontradicted* testimony and admissions of Appellants. They do not and cannot quarrel with the Findings on that conduct. Never do Appellants in their brief even attempt to defend this conduct *because they know they have no defense* to such action. As major examples only of this unmentioned and undefended conduct (details and other such conduct are found in the Findings of Fact of the Court), Appellee has stated the 22 major acts in a preceding section herein (pp. 13-19).

7. Appellants' "Statement" in Their Brief Is Misleading as to the Facts and Issues

Appellants' legal arguments are considered herein under the appropriate sections of this brief.

Appellants in the part of their brief entitled Statement (pp. 5-25) in many instances misstate the facts of record and often state facts not supported by the record or re-

[49a] Rule 52 provides: "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses." On credibility see *infra* pages 40-41.

[50] *Supra*, note 47.

jected by the trial court because of lack of credibility of particular witnesses for Appellants. While many of the misstatements by Appellants are not serious in and of themselves, they combine to create a total impression of Appellee's business and the facts involved in this controversy which is completely erroneous and misleading.

Appellants in the first paragraph of their "statement" create the impression that Nutrilite is sold *entirely* by the use of the booklet "How to Get Well and Stay Well" by salesmen going from door to door. This is not so. The references in the record by Appellants certainly do not support this impression. In fact, the record reveals that the majority of sales are *not* made through the use of the booklet or door to door sales, (R. 56, 213-214), but rather through consumer recommendations and referrals. The trial court found that only about 40% of the *initial* sales to customers were made by use of the pamphlet (R. 757).

Appellants also create the erroneous impression that Nutrilite is sold on a contract basis, stating, in effect, that each customer enters into a "contract" to purchase two hundred dollars worth of the product. This is also untrue. While it is true that is is recommended that the use of the product be over an extended period of time in order to obtain adequate results (and the medical testimony bears this out (R. 107)), sales ordinarily are on a month to month basis (R. 213-214). The only testimony concerning a $200 contract is a statement by Appellant Dunbar as to what A. G. Murray *told* him (R. 315). (The attitude of Murray is reflected in Appellee's Exhibit 16, the so-called "Pressure memorandum", R. 1030a, 67-69). No evidence of unreasonable price was offered by Appellants in this case, and they know that for the 16 vitamins and minerals in Nutrilite, plus its unique base, the price is most reasonable. Yet, they create an opposite and untrue inference.

The second paragraph of Appellants' "statement" (Brief pp. 6-8) is devoted to a discussion of the pamphlet

claimed at one point in the record by Appellants' counsel to be involved in the California indictment of 2 of Appellee's officers (R. 297). Counsel for Appellee pointed out that this pamphlet was not before the Judge out there, but is merely a part of the evidence which the Government says it will offer when that case is tried[51] (R. 298). Appellants neglect to say that *this booklet is not involved in the instant case in any way, was not used as a basis of the decisions authorizing multiple seizures, and was in fact discontinued many months prior to the seizure actions which gave rise to this controversy.* Also, the claim (P. 6 Appellants' brief) as to the actual charge made in the indictment as "deliberately misrepresenting the therapeutic value of Nutrilite" is not supported by the record herein but is a gratuitous statement by Appellants of a kind they sprinkle freely all through their Brief.

Appellants offered no evidence that any of the Appellants herein ever knew of the indictment or the pamphlet they say the Government will offer in support of the indictment, or that any of their actions involved in this case were taken as a result of or were based upon the pamphlet or the indictment.

Appellants say the charge in the libel papers is "false labeling representations" (p. 9, Brief) and again the record references they cite do not contain these words at all, nor does any other part of the Record herein.

Appellee will consider the statements about Appellants Crawford, Larrick and Dunbar and the psychiatrist Dr.

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[51] The Federal Judge before whom this indictment is pending has not set the case for trial, after first continuing it at the request of the Government (Finding 24 R. 764) as the Judge says the trial would be a waste of money (R. 1037) since the pamphlet allegedly used there admittedly was discontinued months before the indictment was returned, 14 months after the hearing thereon. (Finding 9, R. 757; Finding 14, R. 760.)

Butz they now say they relied upon, *infra,* pages 57-60. Suffice it to say here that the brief's statements (pp. 18-21) about them are an almost complete misstatement of the evidence and findings of fact in this case. The Court's attention is called to the fact that they omit Kingsley entirely in their outline of the decisions; yet his are the *only presently effective decisions,* as Judge Pine invalidated those by Crawford, Larrick and Dunbar and they took no appeal from his decision. (Fdg. 34, R. 767.) Also, only the 42 page pamphlet is now in use (R. 52) yet Appellants base most of their discussion on the 58 page pamphlet, use of which was discontinued on October 11, 1948—18 months ago (Fdgs. 19-20, R. 762-763).

Appellants also attempt to create the impression that four libels were based upon the 58 page booklet, one libel on the 36 page booklet and five on the 42 page booklet. An examination of the references to the record cited by Appellants in support thereof not only fail to support these statements but the testimony of Appellant Larrick is to the effect that more than one seizure was based on the 36 page booklet he condemned *ex parte* (R. 408).

Appellants in speaking of the action denying their first motion to dismiss the complaint, state (p. 12) that "Judge Pine questioned the authority of Appellants Crawford, Larrick and Dunbar to act on behalf of the Federal Security Administrator in making the determinations of probable cause." This is a masterpiece of understatement. Judge Pine not only "questioned" their right to make the decisions but in fact held that they were *unauthorized* and *unlawful* (Finding 34, R. 767, 593).

Appellants state on page 13 that "on April 14 notices to take depositions were served" on named individuals. Their next sentence states that "the notices were followed by the service of subpoenas *duces tecum.*" This is in error. Appellee simply served notices and subpoenas commanding the named individuals to appear for the taking of deposi-

tions. The same subpoena, pursuant to Rule 45 of the Federal Rules of Civil Procedure, commanded the production of certain reports, and correspondence to be used during the course of the depositions. At no time did Appellee serve subpoenas *duces tecum* under Rule 34 of the Federal Rules of Civil Procedure.[52] (See R. 743-745.)

Appellant's statements about Appellee's evidence consisting of Appellants' own admissions are considered *supra* pp. 19-20.

Appellant's attempt in their brief (pp. 15-16) to undermine and twist the medical testimony of Dr. John A. Myers of Baltimore is particularly to be condemned. An examination of the record in this case will disclose that he was the outstanding medical expert at the trial.[53] At no time did Dr. Myers testify, as Appellants would lead this Court to believe, that "common dietary deficiency diseases" are "peptic ulcers, cold, sinusitis, colitis, eye trouble, ... pneumonia, cancer" etc. An examination of the record cited by Appellants on this point will disclose that they are guilty of a serious misstatement and that here as always they were asking what Dr. Myers as a doctor might conclude from certain lengthy medical terms, not appearing in the pamphlets but conjured up by Appellant's Counsel. For hour upon hour Counsel for Appellants sought to put such words in Dr. Myers' mouth but for hour after hour

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[52] Appellants cite the fact that a motion to quash the subpoenas was denied by Judge Clark, one of the three Judges. At no time did Appellants seek to have Judge Clark's order reviewed by the full three-judge court, yet Section 2284, Title 28, U. S. C., specifically provides for such an appeal from the action of a single judge. They therefore have waived this objection (it is of no merit anyway) by failing to exhaust their statutory remedy. See *infra* page 168.

[53] It is significant to note that Appellants produced four expert witnesses. Two of them admitted stating erroneous facts under oath (R. 482-484, 490-491); another could not agree with the findings by Butz (R. 438, 435).

he patiently explained how inapplicable such scary undreamed of diseases are to the product and pamphlets before the Court (R. 92-183). Never would any ordinary purchaser reading the pamphlets think of any of the diseases Counsel for Appellants cross-examined Dr. Myers on at great length, and certainly none of those diseases are mentioned directly or by implication in the pamphlet. See for example page 113 of the Record where Appellant's question Dr. Myers on endocarditis, pericarditis, angina pectoris, aneurism—on other pages of Dr. Myers cross-examination (R. 92-183) similar questions are asked on other such names no ordinary purchaser would know.

The references to Dr. Truesdail are erroneous (P. 14, n. 8, p. 43, n. 15) as he in fact testified at the very part of the record cited by Appellants that he recommends against sale of a vitamin product like Nutrilite after it had been packed for six months, not the year stated by Appellants (R. 285-286).

Reference is made to the deposition of Acting Administrator Kingsley (R. 501-518) stating "he had examined the editions of 'How to Get Well and Stay Well' upon which his determination was based" seeking to convey the idea that he read each of the three editions. Appellants are completely cognizant of the fact that Kingsley did *not* read the three editions of the booklet upon which his determinations were based but relied upon a *single unidentified* pamphlet, saying "I am uncertain as to which version I read" (R. 505, 513).

It is worthwhile to note that the Appellants who have violated all the rudiments of fair play seek to extol their years of "experience" and "utmost good faith" as conclusive evidence of their *inability* to act arbitrarily and capriciously. (Pp. 18-21 of Brief.) It is not uncommon for administrative officials to raise such a cry in defense when their actions are challenged.

Appellants attempt (pp. 23-25) to recite the basis for the

finding of the Court below that Appellants acted arbitrarily and capriciously in reaching their decisions of probable cause. Few, if any, of those facts were relied upon by the Court in reaching their conclusion. In a footnote Appellants refer to the "secret indictment" in California as being part of the arbitrary conduct of Appellants. (Page 25, note 11.) This, of course, is ridiculous and was not so considered by the Court below. Most of their other criticisms are of like character, and they did not discuss the actual Findings of Fact of the Trial Court in any attempt to show that under Rule 52 of the Rules of Civil Procedure they were "clearly erroneous." See *United States* v. *Yellow Cab Co.*, 70 Sup. Ct. 177 (Dec. 5, 1949), and *supra* note 49(a).

8. Appellants in 10 Years Surveillance Unable to Develop One Fact Justifying Seizures

One very remarkable thing which Appellee wants to call to the attention of the Court, without laboring the point, is that Nutrilite has admittedly been under the surveillance of Appellants since 1939, according to its own records (R. 387). Under Section 704 of the Act everything in connection with Nutrilite's manufacture and sale has always been subject to the most rigid inspection by the Food and Drug Administration, as are all similar products manufactured by other companies. Appellants' Counsel have stressed that they have made a most thorough investigation in this case (R. 16) and reference has already been made to the terrific and extensive interrogation of Appellee's distributors and customers.[54]

From all of this record it is most remarkable that Appellants who made decisions authorizing multiple seizures had before them no evidence of complaints and no facts of any kind critical of Appellee, its product or its labeling

[54] *Supra*, page 25.

(R. 269-271, 329, 330, 385, 507). We then come up to the time of the trial in the instant case with Appellants knowing for approximately 10 months that it would be necessary for them to show some facts justifying their actions herein, but again Appellants present nothing except arguments about words and inferences therefrom, which inferences they knew purchasers and consumers do not draw because their own survey of the impressions of purchasers and consumers had so informed them (R. 39-47), *supra* page 28.

9. Who Is Acting Honestly, Fairly and in Good Faith in This Case?

One further general comment on Appellants' brief is in order. At several places they question Appellee's honesty (p. 34, 98) and good faith (p. 97, 98). Six different Federal Judges have been most critical of Appellants and their actions affecting this case.[55] Yet Appellants seem to still feel they have a special license to impugn and smear us. In their Brief, as throughout this litigation, they make their charges with no evidence of any kind to support them. With some reluctance, but nevertheless, because of Appellants' tactics in their brief, Appellee calls the attention of the Court to three instances which, to say the least, cast some reflection upon the *honesty* of three of Appellants' chief witnesses:

> 1. Dr. Elmer M. Nelson, Chief of the Vitamin Division of the Food and Drug Administration whose duty it is to pass upon labeling of vitamin products (R. 1496) but who nevertheless was never consulted by any of the Appellants prior to their decisions herein (R. 500) signed an affidavit under oath in support of Appellants' Motion to Dismiss in this case stating that the need for Vitamin K in human nutrition had not been established. The other experts in this case testified

[55] R. 767 (Pine), R. 756-771 (Clark, Goldsborough, Tamm); R. 1051 (Fake), R. 1037 (Harrison).

to the exact contrary (R. 84-85, 355). Nelson himself has twice admitted his sworn statement was untrue (R. 491, 1519). If the lower court had sustained the motion to dismiss acting on the basis of this absolute falsehood just because told by Nelson, relying on his background and official position, a terrific injustice would have been inflicted. Is this honest?

2. Appellant Larrick signed an answer under oath to an interrogatory on behalf of all the Appellants stating that Appellant Dunbar *had* seen or heard of complaints against Appellee and after Appellant Dunbar denied this under oath (R. 329), Larrick was forced to retract this untrue statement (R. 406-407). Is this honest?

3. Witness Walter K. Myers of Appellants testified he received information about Appellee's product and labeling from "advertisements," then was forced to admit he had never seen any advertisements of any kind (R. 483-484). Is this honest?

When Appellants start writing about honesty and good faith in this case they should also recall the facts found by three judges in this case. A reading of those findings would never suggest honesty, fairness and good faith on the part of Appellants herein. These judges found these facts after observing the demeanor of three of Appellants on the stand, and after considering Appellants' refusal to put their chief scapegoat psychiatrist on the stand or to call as a witness J. D. Kingsley who did many of the things listed in the 22 points, *supra*, pp. 13-18, in the name of Appellant Ewing. Was their violation of an agreement they made to get a continuance of the trial of the indictment case an honest act? (Item 16 *supra* page 17.) Was their deception in adroitly leading Appellee to believe its labeling unobjectionable to them while secretly, at that very time, planning to unleash their pressure and punishment campaign of nation-wide multiple seizures an honest act? (Items 19 and 25 *supra* page 26.) Perhaps one should not say such things about Government officials, but when those

Government officials repeatedly attack the honesty and reputation of citizens to distract attention from real issues it seems high time that the truth is revealed.

In all the testimony of Appellants and in their brief they use the "scare" technique so ably explained by their *admitted* "expert" on the subject, J. D. Kingsley (R. 509). They tried to "scare" the Trial Court by conjuring up terrible sounding names of diseases which only doctors ever hear of and then twisting undreamed of impressions and general representations which no ordinary purchaser and consumer would ever have (R. 92-183) as is shown by Appellants' own survey of consumer reaction (R. 39-47).

Appellants' claim that the pamphlets offer Nutrilite as a cure for cancer because it is mentioned once in a disclaimer illustration in the pamphlet in the Foreward shows how extreme the interpretations of Appellants are. Judge Goldsborough asked Appellants' Counsel: "Your theory is that a reasonable mind would gather from the book that this medicine would cure cancer; is that what you have in mind?" The answer was: "Yes sir, absolutely" (R. 124). The language where cancer is mentioned is as follows:

> "Consider, for example, our title—HOW TO GET WELL AND STAY WELL. From this title do you conclude that we offer *every* person a means of getting well, whether he is breathing his last few breaths at the age of 110, on his death bed with cancer, in a diabetic coma or about to die of typhoid fever? If so, your conclusions are wrong. With the title of this book be sure to read the explanation on the title page, below the illustration. What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.
>
> "Another example: When you read the title of this book do you assume that we are going to show you how to *stay* well, *in spite* of everything you do to the contrary? If so, it is also a wrong conclusion. You can

follow our suggestions contained herein, and still make yourself ill by drinking too much alcohol, by taking dope, by overdoing, by exposure or by denying yourself certain important items of diet, such as proteins or carbohydrates" (R. 885, 31).

The explanation on the title page is as follows:

"If your health is the result of dietary deficiencies, and IF you want to get well and stay well, be sure to read this book. Even IF you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. IF your health is good read this book and learn how to stay well" (R. 883, 31).

None of the so called medical findings attributed to Butz (R. 761-762), see *infra* pages 57-60, 73, claim that the Appellee's pamphlets offer Nutrilite as a cure for cancer and none of Appellents' medical doctor witnesses so testified, while Appellee's medical expert testified they made no such claim (R. 127). Yet Appellants cross-examined about cancer (R. 96-97, 160-162).

For hour after hour, the Appellants took equally extreme positions in their cross-examination on other incurable diseases having scary unpronounceable names which only the doctors ever heard of. (R. 92-183.) These names are not mentioned in the pamphlets, were undreamed of by its authors and no ordinary purchaser or consumer could possibly think the pamphlets promised that Nutrilite would "cure" the diseases mentioned.

While Appellants' actions throughout are shown by the record and the undisputed Findings of Fact herein to be a record of secret, furtive, carefully concealed actions deliberately designed to injure Appellee irreparably without an opportunity to eliminate suddenly sprung objections, Appellee earnestly believes that the Record and the Findings of Facts amply support the Court's finding of Appellee's

complete good faith, honesty of purpose and fairness throughout.[56]

Since Appellants' brief, as did their evidence at the trial, revolves chiefly around their charges about Appellee's labeling, this discussion of Appellee's honesty and good faith will be confined to that subject, although there are many other facts in the Findings of the Court which certainly establish such a conclusion as to Appellee with respect to its whole business—for example, the complete absence of any complaints where a business of large size is involved and where a most extensive and fruitless investigation has been made by Appellants to try and find unfavorable facts.

The record shows that prior to 1942 Nutrilite's labeling was regularly presented to the Food and Drug Administration for comment [57] and the record is devoid of any unfavorable comments. The Findings show that from 1942 to 1947 no change was made in Nutrilite's labeling.[58] In 1947 the Food and Drug Administration sent a notice to certain of Appellee's officers of a hearing under Section 305 of the Act relating to criminal actions, which notice specifically provided that it did not relate to action "involving the seizure of the article" in libel cases.[59] A hearing was held on this notice, at which certain general indications about Appellee's labeling were made by representatives of the Food and Drug Administration.[60]

Appellee was represented at the hearing by a lawyer whom the Director of the Litigation Section of the Food and Drug Administration has called an expert in this field (R. 1029, 65, 269) and this lawyer advised that the labeling would be rewritten under his direction to eliminate all pos-

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[56] Finding 12 R. 758-760, Finding 13 R. 760, Finding 19 and 20 R. 762-763.

[57] Finding 9, R. 757.

[58] *Ibid.*

[59] *Id.* R. 757.

[60] *Id.* R. 757.

sible objections.[61] This lawyer communicated with the Food and Drug Administration about the rewriting of the labeling and its contents.[62] Five months were taken to rewrite the labeling in a most comprehensive fashion (R. 38). The rewritten labeling was carefully checked with Food and Drug Administration regulations (R. 51), pamphlets specifically approved by the Food and Drug Administration, such as the pamphlet "Facts You Should Know About Vitamins," Appellee's Exhibit No. 5 (R. 941-955, 48, letter of approval R. 48-49), and expert medical and scientific literature in the field (R. 37-38, 47-53, 257).

Appellee began the use of its new labeling in January, 1948 (R. 217) and thereafter learned that the Food and Drug Administration was interrogating its distributors and customers (R. 57-58). Appellee then called upon the Food and Drug Administration to inquire as to whether or not there were objections to its new labeling (R. 58, 728, 750). Appellee was advised that the investigation was merely "routine" and was not advised that there were any objections to its labeling (R. 58). At that time it is admitted that Appellee did tell the Food and Drug Administration that if it had any objections to its labeling or to any phase of its business at any time, it was Appellee's desire to eliminate such objections and that a notice to Appellee of any objections would bring about any changes desired (Fdg. 13, R. 760, Complaint and Answer, par. 9, R. 728, 750).

Without notifying Appellee of any objections to its labeling, Appellants caused the first seizure to be made in Belleville, New Jersey in the manner outlined herein *infra* page 48. The very day that Appellee received the libel papers and learned that Appellants were objecting to the last 20 pages of its 58 page advertising pamphlet (R. 61), telegrams were sent to its top agents throughout the United

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[61] *Id.* 757-758.

[62] Finding 10, R. 758.

States ordering these pages cut out of that pamphlet.[63] Similar instructions were sent in writing to all of Appellee's distributors.[64]

A letter was dispatched to Appellants advising them of this deletion and a further request was made for an opportunity to comply with future objections if Appellants ever had any.[65]

Appellant Larrick then approximately two months later, without notifying Appellee that the 36 pages not questioned in the Belleville seizure papers were objectionable and knowing of the notice and request, authorized multiple seizures on the basis of those 36 pages not previously found objectionable without prior communication with Appellee (Fdg. 29, R. 765).

These facts showing Appellee's good faith are uncontradicted by any evidence offered by Appellants.

10. The Six Ex Parte Decisions of Appellants Were Arbitrary, Capricious, and Oppressive.

Of all the facts in this case, none are more firmly established by the voluminous record brought before this Court by Appellants than those facts which compel the conclusion that Appellants Crawford, Larrick and Dunbar as well as J. D. Kingsley, Acting Administrator of the Federal Security Agency, acted arbitrarily, capriciously and oppressively in arriving at their so-called administrative decisions which authorized the onslaught of multiple seizures of Appellee's harmless and, in fact, admittedly beneficial product.[65a] The circumstances under which the decisions in question were made, particularly in view of the tremendous and serious impact of those decisions upon the Appellee, are the epitome of unfair administrative action.

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[63] Finding 19, R. 762-763.
[64] Finding 19, R. 763.
[65] Finding 20, R. 763.
[65a] See pp. 9-10 *supra*.

While Appellants assign as error (P. 26 Brief) the Findings by the Court below showing that the decisions of probable cause were made arbitrarily, capriciously and oppressively as being "clearly erroneous," they present no specific argument in support of this alleged error evidently realizing all too well that they could not find any arguments and certainly no evidence to uphold what Appellants have done. An examination of the record in this case discloses, on the contrary, that the Court's findings on this point (R. 756-771) are the only proper ones from the admitted and established facts of record. The actions and admissions of Appellants are discussed, *supra* pp. 13-17, 19-27.

(a) Crawford and Dunbar Merely "Scanned" or Read Parts of the Pamphlets in Question, No Honest Attempt Being Made to Read or Interpret the Pamphlets in Their Entirety

No one would question that the device of multiple seizures of a harmless and beneficial product is, to say the least, drastic and harsh. Nor should it be questioned that an administrative officer given the power to authorize such action which works such an enormous irreparable injury should give the matter his honest, fair and deliberate consideration before taking action. This should be particularly true where the determination is reached *ex parte* and where the effect of an erroneous determination would result to the knowledge of the officer, as was the case here, in irreparable damage of incalculable magnitude. Inherent principles of fundamental fairness contained in the "due process" clause of the Fifth Amendment to the Constitution would seem to so demand.

It would appear, then, to be fundamental, that before administrative determinations of the character involved here, there should be some honest and fair effort on the part of the administrative officer so charged to analyze and interpret the labeling in its entirety without lifting sen-

tences and phrases out of context, particularly when the labeling is admittedly the only basis of objection. Appellants in their brief recognize that such labeling should be "read" in its entirety (Page 84). Such, however, was not the case here, for Appellants Crawford and Dunbar admittedly based their decisions on a mere "scanning" of isolated sentences and phrases and a reading of certain parts of the labeling in question.

Appellant Crawford testified that the booklet "How to Get Well and Stay Well" first came to his attention on September 28, 1948, when he authorized the seizure action of October 6, 1948, in Belleville, New Jersey (R. 332, 383). At that time, he did not read the first 36 pages but read the remaining 20 pages (Fdg. 17, R. 761). On September 30, 1948, two days later, Appellant Crawford signed his determination authorizing multiple seizures (Fdg. 17, R. 761). On this date, Appellant Crawford made no effort to read the booklet in its entirety but merely scanned the booklet and looked through the file and signed the conclusion right then (R. 384). This evidence clearly discloses that Appellant Crawford's determination was not a decision reached after fair consideration of all the labeling before him but rather a condemnation of the labeling based upon material taken out of context.

The determination by Appellant Dunbar on December 9, 1948, was made under similarly shocking circumstances. Appellant Dunbar was informed by an administrative assistant, A. G. Murray, whose patent bias and prejudice against Appellee will be noted *infra*, pp. 83-86, that "he was considering a number of seizure recommendations" (R. 311-312). Upon the basis of representations by A. G. Murray and without reading the labeling in its entirety, Appellant Dunbar concluded that the labeling had a "tendency to mislead" (R. 315-316, Fdg. 30, R. 765-766). On this basis, Appellant Dunbar signed his determination which authorized and resulted in further wide-spread seizures.

The actions of Appellants Crawford and Dunbar in authorizing the drastic use of multiple seizures without taking the little time necessary to read the labeling in its entirety clearly evinces an attitude which, under the circumstances, is the antithesis of "fair play." This Court in *Kassin* v. *Mulligan*, 295 U. S. 396, aptly stated at page 402:

> "Arbitrary or capricious appraisal of evidence . . . is in legal effect failure to consider."

With the ruin of a reputable private business, upon which more than 5000 people depend for their livelihood, and the product of which thousands of users have obviously found beneficial, Appellants Crawford and Dunbar certainly should have considered fairly the matter before them rather than indulging in "short cuts" and "rubber stamping" which are anathema to due process and enlightened administrative action. In *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 305, in discussing "rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement," Mr. Justice Cardozo said:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay when that minimal requirement has been neglected or ignored."

(b) Three Determinations on Three Separate Pamphlets Based Upon a Reading of ONLY ONE Unidentified Pamphlet

On January 28, 1949, at the request of Appellant Dunbar, J. D. Kingsley, then Acting Administrator of the Federal Security Agency, after listening to Dunbar and his counsel (R. 503) in an *ex parte* proceeding made three determinations identical in language with the determinations of Appellants Crawford, Larrick and Dunbar,[66] declared un-

[66] See Appellants' Exhibit 23, R. 1532-1541, 518.

lawful by Judge Pine (Fdg. 34, R. 767). Obviously, Dunbar and his counsel were biased in supporting the decisions previously made by Appellants Dunbar, Larrick and Crawford. J. D. Kingsley's testimony by way of an incomplete deposition (R. 501-516), which was put into evidence by Appellants clearly reveals that he knew three separate determinations were requested, each being based on different booklets (R. 512-513). Despite the fact that three determinations were made, Kingsley testified that he read *only one* version of the booklet and was uncertain and hazy as to which version that was (R. 504-505, Fdg., R. 767-768). As a matter of fact, Kingsley testified that he did not know whether all three booklets were before him [see] (R. 505, 513, Fdg. 35, R. 767-768).

It is absurd to contend that the determinations of J. D. Kingsley, which sought to authorize continuation of the multiple seizure program to "keep a sustained pressure" on Appellee, were made in an atmosphere and in a manner which reflects that the determinations were fairly reached. When the matter was submitted to him and he was informed that three determinations were requested, every sense of fair play would seem to dictate that an attempt should have been made to consider the labeling relating to each determination. This apparently was a matter of complete indifference to Kingsley.

J. D. Kingsley's palpable abuse of the powers vested in him is made even more so by the fact that prior to his determinations he was twice requested by Appellee that if he was asked to pass upon its labeling he grant it an opportunity to show him that the labeling in question was not misleading in any respect. Furthermore, he was advised that an erroneous decision on his part would put Appellee completely out of business by further multiple seizure ac-

[see] Appellants in offering Kingsley's deposition withdrew all their objections to questions asked of him that such questions were probing his "mental processes." (R. 506-508).

tions.[67] Despite these requests and the information contained therein, Kingsley made no honest effort to appraise each booklet condemned by him or to be sure that he had the right booklets before him. It is obvious from these facts, and others which will be discussed hereinafter, that J. D. Kingsley did not give the matter his considered judgment but took it upon himself to make only a cursory examination of the matter before him *despite full knowledge of the serious consequences of his decision* as Appellee's communication advised him specifically of these consequences.[68] His conduct in the matter is not dissimilar to what the law designates as "willful misconduct,"[69] rather than of an ordinary reasonable and prudent person.

These facts on Kingsley are thus a perfect picture of an arbitrary administrator, badly advised by his biased subordinates bent upon supporting the decisions they had previously made, brushing aside information in his own files and available from Appellee, issuing a paper which would to his knowledge destroy the economic existence of thousands. Appellants now say he is unstoppable regardless of how he acted.

(c) All Six Determinations Made With No Facts Before Decision Maker Showing Injury or Damage to Any Purchaser or Consumer

Section 304(a) of the Act prohibits multiple seizures "except" when as a condition precedent "facts" are "found" and a decision made on those facts authorizing such seizure. The Administrator must have probable cause to believe "from facts found" that Appellee's product was being sold

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[67] Complaint and Answer Paragraph 18(a), R. 732, 752. Finding 35, R. 767-768. See Appellants' Exhibits 8, 9, 10, and 11. R. 1163-1171, 298, 300.

[68] *Ibid.*

[69] See *Lacy* v. *Louisville & N. R. Co.*, 152 Fed. 134 (CCA 5th, 1907).

under labeling which is or would be "in a material respect" misleading to the injury or damage of the purchaser or consumer. The words "in a material respect," the word "injury" and the word "damage" must mean something. To have the volume of sales it has Appellee obviously has thousands of customers, and it is in evidence that it has more than 5000 distributors (P's. Ex. 16, 1030, 66-67). Appellants have conducted one of the most intensive and searching investigations of Appellee by interrogating its customers (R. 728, 750, para. 9). Even after this litigation started Appellants had nearly a year to dig up facts against Appellee yet they produced none at the trial and themselves offered evidence (R. 531) that Appellants were arbitrary and capricious in:

> "The further rendering *ex parte* by the Acting Administrator of the Federal Security Agency, of unlawful decisions that the labeling of plaintiff's product is misleading, to the injury or damage of the purchaser or consumer where no facts exist which show that such was, in fact the case" (R. 532, item 6).

And it is significant that Appellants Crawford, Larrick and Dunbar as well as J. D. Kingsley *admitted* that at the time they made their determinations they had no facts before them showing injury or damage to any purchaser or consumer of Nutrilite from its labeling, and they knew of no complaints from purchasers or consumers.[10] While not conclusive in and of itself as evincing a lack of probable cause on the part of those making the determinations, this total lack of consumer protests or complaints does become significant, however, when considered with the other actions of Crawford, Larrick, Dunbar and Kingsley in making their determinations and the circumstances surrounding the determinations. Consumer complaints against Nutrilite and

[10] R. 270, 385, 761 (Crawford); R. 271, 329-330, 765 (Dunbar); R. 270, 765 (Larrick); R. 269-270, 507, 767 (Kingsley).

its labeling obviously were non-existent and their absence should have put Appellants on some notice that the labeling was not misleading, despite the claims of prejudiced and biased subordinates. Although facts showing injury or damage were not known to any of those who made determinations of probable cause, all of those determinations recited that the labeling "*is* in a material respect misleading to the injury or damage of purchasers or consumers" (R. 1172, 1174, 1217-1218, 1534, 1535, 1541). It is inconceivable how such a determination could be justly made without at least some semblance of facts showing consumer reaction. Each of the Appellant's decisions say that Appellee's labeling "would be *and is*" misleading and "in a material respect." The shocking fact of this case is that the only consumer sampling conducted by the Food and Drug Administration revealed that the exact opposite was true, i. e., *that consumers were in fact not misled by the labeling* (R. 39-47), see *supra*, pages 28-30. The language of *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91 is most appropriate:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of *evidence, and capriciously make findings by administrative fiat.* Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." (Italics supplied.)

Under the Act, the decisions authorizing multiple seizures must be based on "facts found" (Section 304(a)). The right to use multiple seizures thus was intended to depend on facts and Appellants admittedly had none. And as is stated

in the next section Appellants' only relevant facts were the opposite of their conclusions. Rule by edict and fiat has always been contrary to the principles upon which our Government is founded. Mr. Justice Frankfurter, concurring in *United States* v. *United Mine Workers*, 330 U. S. 258, 307-308.

Appellants were certainly not acting as reasonable and prudent men in making their decisions when the only facts in their files dictated the opposite conclusion to that reached.

(d) The Determinations Ignored and Were Diametrically Opposed to the Findings of Fact of Appellants' Only Known Official Investigation

Further evidence of the gross abuse of the extraordinary summary power vested in the administrative officials who made the determinations authorizing multiple seizures herein is to be found in the Findings of Fact of the investigation in Clarkfield, Minnesota, undertaken by a Food and Drug Inspector at the request of the Washington, D. C. office of the Food and Drug Administration.[71] The telegram of instructions dated November 18, 1948, ordered that "an investigation be undertaken . . . to determine scope and character of representations made orally, and by accompanying literature." The findings of fact of the Inspector on his investigation conducted pursuant to these instructions stated, in part, as follows:

> "All people I talked to including Mr. Quale, the distributor, were very friendly and cooperative. None of them thought that Nutrilite was a cure for anything but merely vitamins and minerals which would build their bodies up. None of these people were the rabid health addicts that one so often comes into contact with in an investigation of this type" (R. 930, 40).

[71] The telegram requesting this investigation and the results of it are found in Appellee's Exhibit Number 4 (R. 929-939, 39). See also Finding of Fact 31 by the District Court (R. 766).

Attached to the Food and Drug Inspector's findings are certain memoranda of interviews with users of Nutrilite (R. 931-937). These indicate that none of those interviewed believed Nutrilite to be a cure. Appellants' whole case is based on their contention that purchasers and users under customary conditions or purchase and use would believe just the opposite. The survey thus destroys their whole case. See *supra*, pages 27-30.

The record shows that in about 10 minutes after the trial started Appellee practically dissipated the Appellants' entire case by offering in evidence this survey from Appellants' own files which refutes every contention made by Appellants. Is it any wonder the trial court was shocked to find that Appellants proceeded *against* the information in their own files.

Despite this survey and its findings which concluded, in effect, that no broad representations were being made (see *supra*, p. 54), a seizure was affected in that very locality shortly thereafter, although no other investigation was conducted (R. 937-939). As far as the record in the case discloses, and as far as Appellee has been able to discover, this report and the Nebraska survey of similar import (R. 15) are the only Findings of Fact in the possession of Appellants which tended to show consumer reaction to the labeling in question.[71a] It is obvious, however, that this finding was ignored by the administrative officials who made the determinations of probable cause. In view of the fact discussed in the preceding section, that Appellants had no facts showing injury or damage to purchasers or consumers or any forms of complaints before them when the determinations were made, it was certainly incumbent upon them to call for and consider what little the Food and Drug Administration files contained concerning consumer

[71a] The results of the Nebraska survey, also secured from Appellants' files, being merely cumulative in character, was not offered in evidence herein.

reaction to the Appellee's labeling, as consumer reaction was the very question before them. Each decision maker so stated (see *supra*, page 27). If in fact those files were considered, it is inexplicable how and why the Appellants reached the conclusions they did.

The drastic nature of the power sought to be exercised by Appellants would appear to command that the natural and available avenues of information be explored.[72] Yet all that Appellants based their actions upon in this case was either a hasty scanning of part of the labeling in question or no scanning at all, and the vague and ambiguous statements attributed to ar unqualified psychiatrist which have been casually labeled by someone for Appellants as "Findings of Fact." It is only reasonable to believe that Appellants knew of the survey of purchaser impressions and it was certainly arbitrary and capricious to condemn the labeling without considering it and without questioning the so-called findings of Butz. In fact all of those making decisions testified they did *not* even talk to Butz.[73]

The administrative determinations herein were certainly not of the character which should receive proper deference from courts. To hold that the manner in which Appellants exercised this power was not subject to the "inexorable safeguards" of due process would be to place in the hands of the executive branch of the government a power which the framers of our Bill of Rights justifiably feared and guarded against.

As will be noted *infra*, pages 76-78, "probable cause" is no more than nor less than "reasonable cause." The cases would appear to establish that "reasonable or probable cause" does not exist where a party ignores or fails to take advantage of "reasonable" sources of information which

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[72] See page 80 where authorities are cited on lack of probable cause under such circumstances.

[73] Finding 18(a) R. 761, R. 327-328, 385, 505.

might reveal facts which would have deterred the action taken. This is especially true where information naturally within the knowledge of a subordinate or employee is not inquired into. See *infra*, pages 80-81. Surely, Appellants Crawford, Larrick and Dunbar and Kingsley should have inquired as to what the official files contained concerning the labeling in question. There was no exigency which might have authorized the by-passing of deliberate and considered judgment and as "reasonable men" the Appellants should have made some further inquiry.

(e) Appellants Acted Arbitrarily and Capriciously in Placing Any Reliance Upon the So-Called Findings Attributed to a Psychiatrist Unqualified to Make Such Findings

All of the Appellants as well as J. D. Kingsley who made determinations of probable cause claimed in their testimony that they relied upon certain papers labelled Findings of Fact, and allegedly made by Dr. Robert C. Butz, a psychiatrist employed by the Food and Drug Administration.[74] These so-called findings were ostensibly accepted by Appellants and Kingsley without any consultation with Butz, or any attempt to verify or corroborate the conclusions reached by Butz or to connect the things named by the papers attributed to Butz with the pamphlets (Fdg. 18(a), R. 761). Appellant's statement that Crawford "re-examined the booklet to determine whether the booklet represented Nutrilite as an effective treatment for those symptoms and conditions" (Brief pp. 9-10) i. e., those named in the finding attributed to Butz, is entirely in error as reference to the record citations given by them clearly shows. Later herein, *infra* pages 72-74, Appellee points out this fact on non-connection between those alleged findings and the pamphlets in more detail. Furthermore, Appellant Dun-

[74] Finding 18(a) R. 761, R. 333-334 (Crawford); R. 395 (Larrick); R. 315 (Dunbar); R. 505 (Kingsley).

bar admitted that he accepted the findings of Butz, although he (Dunbar) was fully cognizant that Butz was a recent graduate from medical school and his experience was primarily limited to the field of psychiatry (R. 328). The others knew this or could have ascertained it if they had exercised reasonable prudence.

Ordinarily it might be assumed that the findings of a medical man should be accorded considerable deference. Not so in the instant case, however, for it was obvious not only from the deposition of Butz, but also from the testimony of Appellant Dunbar, that the field of nutrition was alien and foreign to Butz, and that his findings have little or no real relation to the pamphlets here involved. Also, Appellants' admissions directly contradict many of these so-called findings. Furthermore, Butz's deposition is replete with statements by him which contradict or so qualify the findings attributed to him that they are rendered worthless thereby [75] and he had obviously studied up on the subject just before the deposition was taken. In fact it was fairly obvious that he probably did not make the findings himself and this was probably one reason Appellants did not call him as a witness. It is also significant to note that Appellants' star medical witness in the trial below testified *that informed medical opinion could not say yes or no to the question as to whether the findings attributed to Butz correctly stated the present-day consensus of informed medical opinion.*[76] To say the least, this undermined Appellants' entire case as each finding attributed to Butz begins with the statement: "It is the concensus of informed medical opinion . . ." (R. 1171, 1173, 1217, 1533, 1534, 1540).

[75] Deposition of Dr. Butz admitted as Appellants' Exhibit 14, R. 1175-1216, 392. It is obvious that Appellants thought the deposition favored Appellee and was unfavorable to Appellants by demonstrating how unqualified Butz is because their Counsel stated (R. 393): ". . . we assumed that plaintiff would offer it in evidence and we weren't going to object to it."

[76] Testimony of Dr. Blankenhorn, R. 438.

Although Appellants sought to justify their actions on the basis of the findings attributed to Butz, and in a real sense attempted to make him the scapegoat for their arbitrary action, no effort was made by Appellants to call Butz as a witness or attempt to explain why he could not be called.[77] The importance of calling Butz or explaining his absence was noted time and time again by the Court below with indications that failure to call him to testify on his qualifications and the findings attributed to him would warrant an inference against Appellants on these facts (314, 333, 391).[77a] Yet counsel for Appellants stated that no attempt would be made to call him (391-393, 762). Appellee made lack of qualifications of Butz one of its major points in its case and Appellants knew of this long before the trial and heard of it constantly throughout the trial. In view of the importance attached by Appellants to the findings of Butz, the Court below properly found that Appellants' failure to call him or explain his absence gave rise to an inference that if Butz had testified his testimony would have been adverse to Appellants (Finding 18(e), R. 762). Here, indeed, silence became evidence of the most convincing character and the inference was rightly drawn by the trial court. See *Interstate Circuit* v. *United States*,

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[77] The address given by Butz in the deposition taken for discovery purposes by Appellee is 9107 Eton Road, Silver Spring, Maryland, which the Court can judicially notice is adjacent to Washington (R. 1175).

[77a] The Court stated at R. 393: "The Court is going to admit this deposition, but the Court feels that it should warn the Defendants that their failure to produce the witness Butz or to give any explanation for failing to produce him, will be very seriously against the defendants' case.

"He is the key witness in this trial and it seems as though the defendants are not producing the witness because they don't want to produce him.

"Mr. Kleinfeld stated, himself, in open court that he hadn't made any effort to procure the attendance of the witness Butz, although every line of investigation in this case goes back to Dr. Butz."

306 U. S. 208, 225, 226; *Clifton* v. *United States*, 4 How. 242, 247.

Section 304(a) of the Food, Drug and Cosmetic Act, in authorizing determinations of probable cause to be based upon facts found by any officer or employee of the agency, presupposes that the officer or employee finding such facts is qualified to make the finding. To use an extreme example, it cannot be imagined that Appellants could hide behind a finding made by an uneducated janitor—but is not their reliance on Butz almost as bad? To base a determination upon facts found by an unqualified employee, particularly in view of the severe consequences flowing from such a decision, would be to act in violation of due process of law. Appellants' reliance upon the so-called findings of an unqualified employee of the Food and Drug Administration is relevant evidence reflecting the arbitrary and capricious nature of their determinations herein.

(f) The Determinations Were Made Secretly Without Giving Appellee the Opportunity It Requested to Eliminate Objections

Conceding, *arguendo*, that Appellants had the right, under Section 304(a) of the Food, Drug and Cosmetic Act, to make the determinations in question without affording to Appellee the opportunity to be heard, that should not mean that Appellee was to be denied all the rudiments of fair play by being kept in ignorance of the determinations which had been rendered against it. Appellants, however, never disclosed to Appellee that the determinations questioning its pamphlets had been made until it became necessary for Appellants to file the same in this action (R. 274). The very nature of the determinations would seem to require that Appellee should have been given some notice of the impending "crackdown," especially since it had repeatedly asked for an opportunity to comply with all objections (Fdg. 13, 20, R. 760, 763). From this secrecy it can be im-

plied that Appellants knew there was something wrong with their determinations and wanted to hide them to prevent its discovery. Secrecy is particularly abhorrent to justice under law. *Re Oliver*, 333 U. S. 257, 264; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 464.

Secrecy provides a cloak for the misinformed and for the use of arbitrary fiat bent on oppressive injury. Here when the veil of secrecy was taken away, there was a shocking disclosure of condemnation without reading, without knowing what was read, of condemning when all the facts in their files were to the contrary, and all the other facts disclosed in the Findings of Fact herein. In *Bratton* v. *Chandler*, 260 U. S. 110, 114 this Court gave a statute a construction which would avoid "secrecy, prejudice and intrigue" by reading in a hearing requirement and saying any other intent should not be attributed to the legislature.

In July, 1948, Appellee had requested Appellants to advise it if ever any questions about any of Appellee's labeling arose so the labeling could be corrected at once, (Fdg. 13, R. 760). Yet no such advice was given before the decisions herein and in fact Appellants take the position that they will not even talk to Appellee about its labeling until all litigation is over, so all Appellee can do is fight or die (R. 419, 421, 534, Fdg. 15, R. 760, Fdg. 20-21, R. 763).

It should be noted again that Appellee, immediately after the first seizure, ordered the pages objected to removed from its labeling and informed the Food and Drug Administration that the seizure was the "first intimation . . . received . . . that any of the literature was objectionable" and that in the future a letter from "the Agency pointing out . . . objections would bring about a correction without the necessity of court action" (R. 763, Appellee's Exhibit 13, R. 1026, 64-65, 63). Appellants ignored this show of willingness to comply and thereafter made ten other seizures and five determinations of probable cause without notice to Appellee (R. 763-766). Appellant Larrick, who condemned

the 36 page booklet, even testified that he was cognizant at the time of his determination of the fact that the determination prior to his had only condemned the last twenty pages of the pamphlet, that these pages had been promptly removed and that Appellee's attorneys had requested an opportunity to comply with future objections (R. 414, 765). In spite of these facts, Appellant Larrick kept hidden from Appellee that he had authorized multiple seizures on the thirty-six pages which Appellant Crawford did not attack or find fault with in any way (R. 274, 765).

(g) The Conclusion of the Court Was the Only One It Could Reach Under the Facts of This Case and the Decisions of This Court

Without a detailed discussion of the other acts of arbitrary, capricious, oppressive and unlawful conduct of Appellants as set forth in the 22 major acts complained of *supra* pages 13-18, and the Findings of Fact herein, it is submitted that the conclusion reached by the Court below was not "clearly erroneous" but was the only conclusion on this record which would be consonant with those principles of statutory construction and due process as interpreted by the decisions of this Court.

Due process of law in administrative action requires not only that there be substantial evidence to support the decision but also commands that the decision be fairly reached. These requirements of substantive due process and procedural due process are separate and distinct and if either is wanting the decisions in question can justly be said to be "palpably wrong and therefore arbitrary." See *Leach* v. *Carlile*, 258 U. S. 138, 140.

Were the determinations in question fairly reached? Could it be said that a mere scanning of the labeling in question in view of the damaging effect of the determinations on Appellee's entire business was consonant with

those principles of fair consideration? The answer is found in *Kassin* v. *Mulligin, supra,* where the Court stated (p. 402) that "arbitrary or capricious appraisal of evidence is in legal effect failure to consider." Could it be said that Kingsley's three determinations based on three different booklets when he read only one, and that one is unidentified, reflected that spirit of fair consideration which due process demands?

What of the investigation conducted by the Food and Drug Administration to determine the impression of Appellee's pamphlets arrived at by purchasers and consumers who read the pamphlets and bought the product? The Food and Drug Administration certainly felt that a report of consumers' reaction was important for the telegram of instructions specifically stated that possible seizures rested on the outcome of the investigation (R. 929).

A similar situation to the instant case and this survey was presented in the decision of this Court in *Kwock Jan Fat* v. *White, supra,* where relevant, although not controlling, evidence was excluded from the record of an immigration proceeding and such evidence was not before either the Commissioner of Immigration or the Secretary of Labor when they each decided the case. This Court held that the suppression or omission of such evidence from the report amounted to a denial of due process. It was stated at page 464:

> "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts . . . to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment."

The decision of this Court in *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, is also relevant to the present inquiry. In that case, the Secretary of Labor imposed fines against petitioner for bringing to the United States, in violation of the immigration laws, persons afflicted with certain diseases which might have been detected by competent medical examination at the time of foreign embarkation. In the case of one of the aliens brought in by the petitioner, evidence was submitted showing that the alien had been subjected to medical examinations prior to foreign embarkation and had been found in good health. The Secretary imposed a fine, however, on the basis of the certified medical opinions of physicians who examined the alien on arrival in the United States, the opinions reciting that the disease discovered "might have been detected by competent medical examination at the port of embarkation." It did not appear from the record whether the Secretary considered the examination conducted just prior to embarkation or whether the medical officers who examined the alien in the United States had been apprised of the foreign examination. The Court, speaking through Mr. Justice *Stone*, held that the Secretary of Labor acted arbitrarily and capriciously. It was stated at page 338 and 339:

> "The letter imposing the fine in the Fusco Case does not show definitely whether the Secretary considered the evidence submitted by petitioner. It recites in one place, 'The alien gave no history of the disease. Indeed, he was not questioned with regard thereto, and the only evidence in the record is the official certificate itself.' And in another, 'It is believed that the evidence placed in the record by the company is not sufficient to call into question the accuracy of the opinion expressed in the official medical certificate.' We need not inquire whether this ambiguity in the record of itself requires the administrative determination to be set aside. *Cf. Tod* v. *Waldman*, 266 U. S. 113, 119, 120, 69 L. ed. 195, 199, 45 S. Ct. 85; *Mahler* v. *Eby*, 264 U. S. 32, 43, 68 L. ed. 549, 556, 44 S. Ct. 283; *Kwock Jan Fat*

v. *White*, *supra*, 253 U. S. 454, 64 L. ed. 1014, 40 S. Ct. 566. For the same result must follow if the record is considered, whichever way the doubt is resolved. If the Secretary failed to consider evidence before him, he exceeded his authority. If he treated the protest and affidavits as evidence relevant to the discoverability of the immigrant's disease at the time of sailing, but, nevertheless, chose to rely upon the certified opinion of the examining physicians at Ellis Island, we think that more is involved than the weighing of the evidence, and that his determination cannot stand. For the medical opinions did not reveal the facts upon which they were based, and they were formulated by physicians who, so far as appears, were not apprised of the fact that three previous examinations of the nature described had been made. The detailed information as to those examinations which petitioner submitted to the Secretary in this case might reasonably have affected the expert judgment of the physicians at Ellis Island. In relying upon their opinion alone, without putting these additional facts before them, we think the Secretary acted arbitrarily and unfairly.

"The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly, to the end that he may consider all evidence relevant to the determination which he is required to make, that he may arrive justly at his conclusion, and preserve such record of his action that it may be known that he has performed the duty which the law commands. Suppression of evidence or its concealment from a party whose rights are being determined by the administrative tribunal, has been held to be so unfair as to invalidate the administrative proceeding. *Kwock Jan Fat* v. *White*, *supra*; *Lewis ex rel. Lai Thacy Lem* v. *Johnson*, (CCA 1st) 16 F. (2d) 180. It is equally offensive to conceal from the experts, whose judgment is accepted as controlling, facts which might properly have influenced their opinion."

Previously, the opinion pointed out the scope and extent of judicial review of the action of the Secretary. It was said at pages 335 and 336:

"The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority . . . whether there was any evidence before him to support his determination . . . and whether the procedure which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized."

In making the decisions in question, without reading the labeling in its entirety, by accepting the findings of the psychiatrist without question, in ignoring the fact that no facts showing injury or damage were presented to them, by ignoring the absence of consumer complaints in ignoring their own files which showed a negative result in an investigation of consumer reaction, in failing to give notice to Appellee who had expressed an honest desire to conform to the views of the administration, can it be said, in the language of the *Lloyd* case, *supra*, that the determinations satisfied "elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized"? The conclusion that the Appellants acted arbitrarily, capriciously and oppressively in making their determinations is inevitable and could not be otherwise.

11. Appellants Violated the Statutory Provisions Here Involved in Making Their Decisions Authorizing Multiple Seizures

(a) Appellants Have Statutory Power to Make Only One Seizure "Except" in 4 Specified Cases of Misbranding—They Can Make Unlimited Seizures of Products Charged to Be Adulterated

Section 304(a)[18] provides that Appellants have the power to make unlimited seizures in cases of adulteration,

[18] *Supra* footnote 1.

but "not more than one" seizure "based upon the same alleged misbranding"—"except" in 4 exceptional and specified instances. These are: (1) When the United States has won a judgment condemning the particular misbranding and when the Administrator has probable cause to believe from facts found, without hearing, that (2) the "misbranded article is dangerous to health," (3) the labeling is "fraudulent" or, (4) the labeling is or would be in a material respect misleading to the injury or damage of the purchaser or consumer. Here Appellants must show they were within one of the 4 exceptions as no charge of adulteration is made. The first three exceptions are admittedly inapplicable (R. 759-760). To satisfy the burden of getting within the 4th exception, the Appellants were required to make decisions based upon "facts found" that Appellee's labeling is or would be "in a material respect" misleading to the "injury or damage" of the purchaser or consumer, and Appellants say they made the six *ex parte* decisions already well identified herein. It is Appellants' actions in making these decisions directly *contra* to all the facts in their files and in the manner found in the Findings of Fact of which Appellee complains.

The statute here gives Appellee a *right* to be free of multiple seizures and says Appellants can acquire power superior to that "right" *only* by making a specified decision. Without the decision under the statute as applied to the facts herein, Appellee's right to be free of multiple seizures remains absolute. The Appellants have no "rights"—only carefully circumscribed "duties" and "powers" under this Statute.

(b) What Appellants Have Done Does Not Comply with the Statute

To say that what Appellants have done as set forth in the Findings of Fact herein (R. 756-770) complies with Section 304(a) does violence to all reasonable construction

of the provisions therein contained. Subsections (c) through (e) of this section discuss "probable cause." The next subsection (f) discusses Appellants' "use of multiple seizures as a punishment" as "a violation of the statute and the due process clause." This subsection considers other aspects of the statutory violation.

To impute an intention to the Congress that citizens would be treated in the arbitrary, capricious and oppressive manner herein revealed by Appellants' actions does not comport with logic. Is it any wonder that Appellants do not attempt to defend their conduct on the merits but resort to a claim that their actions are free from examination by any court. Congress certainly intended that all persons be treated fairly under the words of Section 304(a) here involved and by no stretch of the imagination can it be said, on the facts in this case, that Appellee has received that fundamental fairness which due process of law has always required.

The only provision of Section 304(a) involved in this case is the provision prohibiting multiple seizures except:

> "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency . . . that the labeling of the misbranded article is . . . or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

Under the provision just quoted it is to be noted that the words "without hearing" *can* be applied *only* to "facts found" and that in any event the Administrator is *not* prohibited from granting a hearing. We believe that the fundamental fairness required by the due process clause of the Fifth Amendment should be read into this provision so as to require a hearing under the language of the Act where facts such as in the instant case exists. Since the Administrator is not *required* by the statute to make his probable cause decision, without hearing, the statute should

be read so as to avoid all constitutional questions and require that Appellee be granted an opportunity appropriate to the nature of the matter under consideration to present its facts to him before he makes decisions authorizing the use of multiple seizures under facts like those in the instant case. To have given Appellee an opportunity to present its side of the matter to him would have caused little delay, slight expense, no prejudice to the public interest, and at the same time would have protected against the kind of arbitrary action here proved. The opportunity need not have been a regular judicial hearing. *The Japanese Immigrant Case*, 189 U. S. 86, 100. In *American Power & Light Co.* v. *Securities & Exchange Comm.*, 329 U. S. 90, 108, the Court said:

> "Here, in the absence of definite contrary indications, it is fair to assume that Congress desired that 11(b)(2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto . . .
>
> "But should the Commission neglect to follow the necessary procedure in a particular case, such failure would at most justify an objection to the administrative determination rather than to the statute itself. It would then be needless to do more than nullify the action taken in disregard of the constitutional rights to notice and opportunity for hearing."[79]

Coming then to the facts in the instant case other than the probable cause phases discussed *infra* pages 72-81, it is believed that Appellants exceeded the authority vested in them by statute by their arbitrary, capricious, and oppressive actions set forth in the Findings of Fact herein. Since

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[79] A hearing requirement was read in to save a Tennessee statute regulating real estate brokers in *Bratton* v. *Chandler*, 260 U. S. 110, 114, to avoid violation of due process by "secrecy, prejudice and intrigue." The same was done for a Georgia statute in *Toombs* v. *Citizens Bank*, 281 U. S. 643.

such actions have been fully discussed *supra* pages 46-66, they are not repeated here.

> ". . . to allow an administrative officer to destroy a profitable business on the ground of an alleged unlawfulness which is disputed, without allowing the owner a chance to know the charges and to meet them with evidence and argument, involves unfairness apparent to any eyes not blinded by dazzling conceptualism. To find that alert judges would permit such injustice would be amazing."[80]

On this record we find Appellants ignoring the absence of facts and complaints and ignoring the only facts they had in their files (those favorable to Appellee) and holding that Appellee's labeling was "in a material respect" of such a character as to be "misleading" to the injury or damage of the purchaser or consumer (R. 1171-1172, 1174, 1216-1218, 1532-1541). How it could be "in a material respect" misleading when all the facts were just to the contrary, and how it could be misleading to the "injury" or "damage" of the purchaser or consumer when they had no facts and no complaints and why they have no "facts" after all of their searching investigations raises but one possible inference. The absence of facts speaks louder than words in Appellee's favor. Appellants called not one single consumer or purchaser as a witness at the trial, yet they admittedly conducted a most exhaustive investigation of Appellee, its product, its distributors and its purchasers.

If the Appellants had developed any facts whatever in connection with the indictment in California, the injunction action in California, the ten libel actions throughout the United States, or in the course of their nation-wide investigation of Appellee's customers and distributors, they certainly would have offered such facts to show that

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[80] Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942), 51 Yale L. Rev. 1093, 1120.

their decisions had some reasonable basis in fact and their failure to do so can leave only one conclusion and that is they had no facts and have no facts.

Appellants knew that they would be called upon to justify their actions herein from December 30, 1948 on up to October 17, 1949, when the trial started. During that time Appellee had taken the deposition of every major employee or officer of the Food and Drug Administration and the Federal Security Agency who had anything to do with Nutrilite or its labeling. During that time Appellee filed numerous interrogatories and Appellants were forced to answer these interrogatories after their objections were overruled by the Court. During that time Appellee had called upon Appellants to make many admissions under Rule 36 of the Federal Rules of Civil Procedure, and again, after the Court had overruled their objections, the Appellants were forced to answer. Yet under all of these circumstances they came up to the trial in October, 1949, with a defense still lacking in any facts on injury or damage—they still lack any complaints—and all the credible evidence was against them. Appellee has thousands of customers (it must have to do the large volume of business it does) and Nutrilite has been sold for 16 years; yet, under the most punishing of investigations no facts showing complaints against Appellants were found—a most remarkable record for any business of this size. Further, if Appellants had any way to strengthen their decisions of probable cause they certainly would have written such facts into the Kingsley decisions made after this litigation began and, in fact, as a result of this litigation. Instead of stronger decisions he signed decisions identical in every word with those of Crawford, Larrick and Dunbar.

Could Congress be said to have contemplated that Appellant Crawford could condemn the 58 page pamphlet without reading the first 36 pages (R. 334-335, 383-385). Could Congress be said to have contemplated that Larrick, Dun-

bar and Kingsley would condemn the pamphlet with the purchaser survey finding in their files that such action was 100% wrong and have considered that any of them could have had "probable cause" that the pamphlet was misleading in "a material respect" to the injury or damage of the purchaser or consumer?

We also have the fact that when Appellants questioned pages 37-58 of the 58 page pamphlet they were immediately deleted and Appellee requested an opportunity to comply with any other objections ~~and avoid multiple seizures~~ (R. 59-65). Can Congress be said to have contemplated that Appellants would arrogantly refuse to tell Appellee what they thought was wrong with the remainder of the pamphlet and then two months later authorize further seizures by condemning these first 36 pages?

(c) J. D. Kingsley's Determinations of Probable Cause Are Void on Their Face

Section 304(a) of the Federal Food, Drug and Cosmetic Act allows multiple seizures of a product,

> ". . . when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency, that the misbranded article is . . . or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

And as a result of Judge Pine's ruling that it is the Administrator who must make these determinations of "probable cause," J. D. Kingsley made three on January 28, 1949 (Dfs. Ex. 23, R. 1532-1541, 518). Each determination made by Kingsley (and those of Appellants Crawford, Larrick and Dunbar), was exactly the same and read in part,

> ". . . I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration . . . that there is probable cause for me to believe and I do believe, that the label-

ing would be and is in a material respect misleading to the injury or damage of the purchaser or consumer" (R. 1534, 1535, 1541).

The sole facts relied upon were the three so-called findings of fact allegedly made by Butz (R. 505). All three of these findings begin by stating, "It is the consensus of informed medical opinion that a product consisting of" (R. 1533, 1534, 1540) then follows a listing of various vitamins and minerals "would not be effective in the treatment of"; the first so-called finding names certain symptoms, conditions and diseases (R. 1533-1534); the second refers to "conditions mentioned directly or by implication in the statements quoted in Exhibit 'A' attached" (R. 1535). (Exhibit "A" contains excerpts allegedly picked from some unknown version of Appellee's pamphlet, R. 1535-1540); and the third refers only to "most common diseases" (R. 1541). These so-called facts were not connected or identified in any way with Appellee's pamphlet, nor were they associated in any manner with injury or damage to purchasers and consumers, yet from them *alone* J. D. Kingsley and Crawford, Dunbar and Larrick concluded they had "probable cause."

Since these determinations are a condition precedent to the institution of the "harsh" remedy of multiple seizures, they should state definitely and specifically adequate facts showing the basis of the determinations of "probable cause." These determinations on their face are indefinite and uncertain and are not related in any way to the pamphlets. They do not show clearly that either Butz or Kingsley read the pamphlets and, most important, there is no connection of any sort between the alleged finding of fact and the conclusion that the "labeling *would be and is in a material respect* misleading *to the injury or damage* of the purchaser or consumer."

Kingsley's three determination gave authority to go forward with new seizures and mimeographed papers were

prepared to enable seizures to be made quickly (Finding 32(c), R. 767). Also Appellants may contend these decisions put life into eleven seizures which have caused Appellee irreparable injury, and yet as the Court said in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 302.

> "From the standpoint of due process—the protection of the individual against arbitrary action—*a deeper vice is this, that even now we do not know the particular or evidential facts of which the commission took . . . notice and on which it rested its conclusion. Not only are these facts unknown; there is no way to find them out.*" (Italics supplied.)

The same analysis applies to the determinations of Kingsley, Crawford, Larrick and Dunbar. On their face the decisions do not comply with Section 304(a) and are void.

(d) The Determinations Are Not Conclusive Evidence of Probable Cause

Appellants contend (46 *et seq.*) that the six determinations are conclusive evidence that the decision makers had "probable cause." They compare the determinations with an indictment returned by a grand jury and cite *Ex Parte United States*, 287 U. S. 241, as their authority. It is respectfully submitted that Appellants are in error. First of all there can be no comparison of action by a grand jury composed of from sixteen to twenty-three impartial private individuals with action by the Administrator of the Federal Security Agency acting to uphold previous action of his biased subordinates as shown in the Findings of Fact herein.[80a] A grand jury is not required to act on "facts found"

[80a] Appellants in fact destroy their own analogy by recognizing at p. 50 ". . . the grand jury proceeding is a guarantee against arbitrary action. . . ."

and the whole purpose and nature of grand jury action and action pursuant to this statute are very different. A grand jury authorizes only one action on the same facts and law, not a seizure in 5,000 different places and one indicted is entitled to a speedy trial. The statute here involved provides for a hearing (Section 305) before criminal proceedings are started. And finally, even an indictment is not in every instance considered conclusive evidence of probable cause. In *Ex Parte United States, supra,* the Court held that an indictment was conclusive as to the existence of probable cause *only* to the court to which it is returned, while Kingsley's determinations were not returnable to any court and could only have been questioned in the court below. Moreover, in cases involving the problem of removing a person from one jurisdiction to another in which he had been indicted, this Court has held that an indictment is not conclusive evidence of "probable cause," but only *prima facie* evidence which may be rebutted.[80b] As this Court said in *Price* v. *Henkel,* 216 U. S. 488, at page 491:

> "That at least a *prima facie* case for removal was made by the introduction of the indictments returned against him in the District of Columbia is not disputable. That much efficacy is attributed to a certified copy of an indictment found in a competent court of another district when put in evidence in a removal proceeding. *Bryant* v. *U. S.,* 167 U. S. 104; *Green* v. *Henkel,* 183 U. S. 249; *Hyde* v. *Shine,* 199 U. S. 62; *Beavers* v. *Henkel,* 194 U. S. 73. *But the evidence of probable cause afforded by the indictment is not conclusive.*" (Italics supplied.)

[80b] Rule 40 of the Federal Rules of Criminal Procedure does make an indictment conclusive evidence of probable cause in removal proceedings. The Advisory Committee in their notes to Rule 40 specifically recognizes that the rule is a modification of the previous procedure which developed as a result of the above decisions.

See also *Kassin* v. *Mulligan*, 295 U. S. 396, 401; *Haas* v. *Henkel*, 216 U. S. 462, 481. And in *Tinsley* v. *Treat*, 205 U. S. 20, 32, where the defendant offered evidence to rebut the indictment and the court refused to admit it, the Court said:

> ". . . the judge applied to to remove him from his domicil to a district in another state must find that there is probable cause for believing him to have committed the offense . . .
>
> "Appellant was entitled to the judgment of the district judge as to the existence of probable cause on the evidence that might have been adduced . . ."

Therefore, it cannot be argued that a determination of probable cause, having none of the safeguards of an indictment, such as not being under oath or being the determination by impartial individuals, which is not always considered conclusive evidence of probable cause, can properly be considered as conclusive evidence that J. D. Kingsley had "probable cause." *Ex parte* determinations in other instances are not conclusive (cf. *Lindsey* v. *Hawes*, 2 Black 554) and *ex parte* determinations under the facts herein certainly should not be.

(c) Kingsley Did Not Have Probable Cause Under the "Reasonable Man" Test

The term "probable cause" has been defined and expounded upon in many decisions of this Court involving different fields of law. However, these decisions have not treated the term differently in any particular field but rather have constantly relied on decisions in fields foreign to the one before the Court for their definitions. All of the decisions appear to establish that probable cause is no more or no less than "reasonable cause" and it exists where the facts and circumstances warrant a man of prudence and caution in believing that the particular offense or act has been committed.

One of the most recent definitions of probable cause is

found in the case of *Brinegar* v. *United States*, 338 U. S. 160, a case involving a search without a warrant. The Court there said (p. 175):

> "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act . . .
>
> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt' . . . And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke* v. *U. S.*, 7 Cranch, 339, 348. (A case dealing with seizures under the Collection Law.) Since Marshall's time . . . it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that' an offence has been or is being committed. *Carroll* v. *U. S.*, 267 U. S. 132, 162.) (A case involving search and seizure without a warrant.)[81]

As stated above, probable cause only exists where the facts and circumstances warrant a *reasonable and cautious man* in believing that the offense has been committed. This Court has stressed that good faith alone is not enough to constitute probable cause. In *Director General*

[81] To the same effect are cases involving: search warrants, *Nathanson* v. *United States*, 290 U. S. 41, 47; *Grau* v. *United States*, 287 U. S. 124, 128; *Dumbra* v. *United States*, 268 U. S. 435, 441; *Steele* v. *United States*, 267 U. S. 498, 504; false imprisonment, *Director General of Railroads* v. *Kastenbaum*, 263 U. S. 25, 27, 28; malicious prosecution, *Wheeler* v. *Nesbit*, 65 U. S. 544; malicious institution of proceedings, *Stewart* v. *Sonneborn*, 98 U. S. 187; and seizures, *Locke* v. *United States*, 7 Cranch 339, 348; *The Thompson* v. *United States*, 3 Wallace 155; *Wood* v. *United States*, 16 Pet. 342; *Stacey* v. *Emery*, 97 U. S. 642, 645.

of Railroads v. *Kastenbaum, supra,* the respondent brought an action for false imprisonment against the Director General, an official of the United States government. Certain quantities of butter, stolen from a railroad freight car, were found in a wagon which had collided with a trolley car, the drivers of the wagon escaping at the time of the collision. Railroad detectives, agents of the Director General, thought they had traced ownership of the horse which had been pulling the wagon to the respondent and he was immediately arrested. Respondent was finally released after "his horse proved to be one of another color." The trial court's judgment of $500.00 was affirmed by the Court which said at pages 27-28:

> "*The want of probable cause, certainly in the absence of proof of guilt or conviction of the plaintiff, is measured by the state of the defendant's knowledge,* not by his intent. It means that the absence of probable cause was known to the defendant when he instituted suit. But the standard applied to the defendant's consciousness is external to it. *The question is not whether he thought the facts constitute probable cause, but whether the court thinks they did.* Holmes on Common Law, 140. Probable cause is a mixed question of law and fact . . . Counsel for petitioners contend that, in an action against the sovereign government, it must be conclusively presumed that good faith existed on its part so far as it is responsible for the arrest, and therefore that a complete defense of probable cause on its part is always made out. *But as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the Director General's agent which in the judgment of the court would make his faith reasonable.*" (Italics supplied.)

Therefore, here it is of no importance if Kingsley and the others in good faith thought Appellee's pamphlet misleading. The question is rather whether the Court believes that he acted as a reasonable and prudent man and ground-

ed his determinations on facts and circumstances on which he had "reasonably trustworthy information" and the validity of his determination of probable cause must be measured by the state of his "knowledge, not his intent."

The facts before Kingsley which were not disclosed in his determinations were clearly brought out when his deposition was taken. Kingsley knew that he made three separate determinations because there were three pamphlets involved (R. 513), yet he admitted that he had only read one of the versions and he didn't know which one that was (R. 504-505).[82] Furthermore, even though he had concluded in each of his determinations that Appellee's labeling "would be and is in a material respect misleading to the injury or damage of the purchaser or consumer," when asked whether he had been presented with any facts showing that any purchaser or consumer had been injured or damaged or whether any purchaser or consumer had complained of injury from Appellee's product or its labeling he admitted he had not (R. 269, 507). Certainly the above shows that when the state of Kingsley's knowledge is measured, he had no facts or circumstances warranting a prudent and cautious man to believe that the labeling was misleading to the injury or damage of anyone.

Moreover, Appellee had twice requested an opportunity to present the true facts to Kingsley and each was refused (R. 732, 752). Certainly this, with the absence of any facts showing injury or damage and the failure to have any evidence of complaints was evidence which should have been considered by Kingsley as being in Appellee's favor. The only possible conclusion is that all of this was ignored and this Court has held that a failure to consider evidence in favor of the accused is a denial of due process. *Kwock Jan Fat* v. *White, supra; Lloyd Sabaudo Societa Anonima* v.

[82] Kingsley testified "I am uncertain as to what version I read . . . Whether it was this version or some other version I am not entirely certain." (R. 505. See also R. 513.)

Elting, supra; Kaskin v. *Mulligan, supra; Tinsley* v. *Treat, supra.*

Also Kingsley either ignored the favorable evidence to Appellee disclosed in the investigation conducted of purchasers at Appellants' request (Pl. Ex. 4, R. 929-937, 38-39) or made no attempt to determine its existence. Besides being a denial of due process under the cases cited above, there is considerable authority in state decisions to the effect that want of probable cause may be shown *by the failure to make inquiry or to seek readily obtainable information which would have established the true facts. Baker* v. *Gawthorne,* 82 Cal. App. (2d) 496, 186 Pac. (2d) 981 (1947); *Lawrence et al.* v. *Leathers,* 31 Ind. App. 414, 68 N. E. 179 (1903); *Boyd* v. *Mendenhall,* 53 Minn. 274, 55 N. W. 45 (1893); and the *Kastenbaum* decision *supra,* applied the same reasoning in this Court.

Under the holding of the *Brinegar* case *supra,* probable cause only exists when the facts or circumstances are based on "reasonably trustworthy information." Here the sole information on which Kingsley based his determinations of probable cause was the so-called findings of fact attributed to a psychiatrist Dr. Butz. It is true that the act permits findings of fact to be made by an employee but it is submitted that there must be read into that provision a requirement that the employee be a qualified one. Here the findings were not under oath, Kingsley had never discussed them with Butz (R. 761) and it is respectfully submitted that the Trial Court properly found that Kingsley could not reasonably place any reliance on Butz (R. 762). He was not a biochemist or nutritionist (R. 1185), he did not check his findings by reading scientific literature in the field (R. 1177), he did not conduct any experiments with nor analyze the product (R. 1199), and when his deposition was taken he very definitely repudiated many of the statements in the findings attributed to him (R. 762). Informa-

tion from such a source when the very existence of a large business is at stake cannot by any reach of the imagination be termed "trustworthy."

The Court in the *Brinegar* case, *supra*, in discussing the reasoning behind these standards set down for determining the existence of probable cause said:

> *"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.* They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. *But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability.* The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating those often opposing interests. Requiring more would unduly hamper law enforcement. *To allow less would be to leave the law-abiding citizen at the mercy of the officer's whim or caprice."* (Italics supplied.)

To say that J. D. Kingsley and Appellants Crawford, Larrick and Dunbar had probable cause under the facts of this case clearly "would be to leave the law-abiding citizen at the mercy of the officer's whim or caprice."

(f) Appellants Authorized Use of Multiple Seizures and Embargoes as a Punishment Rather Than a Public Protection in Violation of Statute and Due Process Clause

The multiple seizure provisions of Section 304(a) are clearly designed as a protection of the public by providing for the taking of adulterated or misbranded products off the market entirely. The power conferred is tremendous

in its consequence and the legislative history of the Act[83] indicated that Congress was fully aware of this fact so it circumscribed the use of the power most carefully.[84] Appellants have, in violation of the statute and the due process clause, used multiple seizures and embargoes herein to inflict punishment upon Appellee rather than as a public protection.

This Court has said of the Food, Drug and Cosmetic Act that ". . . . the Act as a whole was designed primarily to protect consumers from dangerous products." *United States* v. *Sullivan*, 332 U. S. 689, 696 citing *United States* v. *Dotterweich*, 320 U. S. 277, 282. It is in the light of this objective that the powers conferred by the words here involved on multiple seizures based on misleading labeling must be construed. *Ex parte Endo*, 323 U. S. 283, 300; *United States* v. *Lovett*, 328 U. S. 303, 307.

As already stated, the public protection provided by multiple seizures is found in taking the product entirely off the market. Here this was not Appellants' purpose. Their purpose was admittedly to use multiple seizures "to keep a sustained pressure against" Appellee (Pl. Ex. 16, R. 1030a, 67).

Looking at these multiple seizure provisions and the actions of Appellants herein it is seen that Appellants have really made no effort (other than the last-minute filing of an injunction action in Los Angeles one year after the first libel seizure was filed[84a]) to take or keep Appellee's product off the market. Appellants admit that the product is harmless and that it contains vitamins and minerals which are

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[83] See Cavers, The Food, Drug and Cosmetic Act of 1938 Its Legislative History and its Substantive Provisions (1939) 6 Law. & Contemp. Prob. 2, 13.

[84] See Senator Bailey, 79 Cong. Rec. 5217, ". . . once there has been a multiple seizure throughout America, all the Court trials in the world would not remedy the wrong. The man would be disgraced; his wares would be discredited."

[84a] See note 35 *supra* 17 and note 85a *infra* page 84.

beneficial as a supplement to the diet of human beings (R. 330, 373-374, 749, 757, 759, 1214-1215). Appellants knowing their own files refute the charges they make in the libel cases (R. 39-47), concocted a scheme of seizing this product in a far-flung geographical pattern to "punish" Appellee as much as possible before the certain rejection of their charges in Court. Such a deliberately designed pattern will inflict the maximum punishment upon Appellee—a punishment which Appellants know is and will be irreparable and irremediable—while at the same time affording no protection whatever to the public. This lack of public protection it is earnestly contended by Appellee, is by inference an admission that the purpose of the Appellants in making the seizures is "punishment" rather than protection. The Trial Court so found.[85]

As Appellants well know, when a seizure is made of a particular shipment of a product that does not prevent a distributor from selling other shipments of the product which he has on hand. When a seizure is made in Belleville, New Jersey, the distributor can sell other shipments of the product he has on hand to any purchaser who will buy and who has not been intimidated by the stigma of the Government seizure action or scared by the publicity released by Appellants which accompanied these seizures (Fdg. 39, R. 769).

If the first ten seizure actions are consolidated and the Appellants carry out their threats to institute additional seizures, Appellee would soon have a large number of "consolidated" cases all over the United States combining two or more of said seizure actions, and there is no provision in the statute for consolidating the consolidated actions. Also, Appellants have tried every possible delaying technicality so far herein so they would be sure to raise this point. The Appellants defeat their own contentions when they say that

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[85] Finding 22, R. 763-764.

the pending libels can be consolidated into one action, for it is obvious that *if they are to be in one action eventually, no reason on earth exists for the institution of ten libels other than "punishment" of Appellee* for failing to guess what Appellants want them to say in its advertising.

The punishment idea is certainly carried forward by the deliberate action of Appellants in seizing Appellee's product in far away places rather than Appellee's home district where its business, witnesses, etc., are located, and where it can best defend itself. Appellants have carefully calculated their actions so that the closest places Appellee can get a trial of a consolidated libel action are either the Federal District Court for the Northern District of California in San Francisco or the Federal District Court in Phoenix, Arizona, (R. 293, 1051-1052), both of which are hundreds of miles from Appellee's place of business. When the Motion to Consolidate and Remove to Los Angeles was argued and opposed by Appellants and Judge Fake said, what Appellants have done here is ". . . the equivalent of what our ancestors fought against when they complained about trials beyond the seas . . ." (R. 1051), Appellants "guessed" that Judge Fake would move the consolidated trial to Los Angeles, so rushed in three days later and filed an injunction action in Los Angeles.[85a]

Multiple seizures are not just an ordinary lawsuit and Appellants know this better than anyone else. They know that more than the mere filing of lawsuits is involved here. The ruinous consequences of multiple seizures seldom if ever flow from an ordinary lawsuit. Comparison with

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[85a] Just as the Court was about to hand down a decision on Appellee's motion to consolidate the Government Attorney forestalled a decision by requesting time to file a brief. When the Court inquired how much time was necessary Government Counsel answered: "' . . . there isn't any rush about this thing, as far as I can see" (R. 1052). See also R. 265-268 on delay in Criminal Case.

other lawsuits is therefore not an apt parallel. Appellants know that there is nothing more damning in the Food Supplement field than the widespread release of information that the Government is "after" or out to "get" Nutrilite. They know that competitors and others repeat the damning bad news over and over. The things said by Appellants and the smearing publicity Appellants have released are grist for this defamation mill.

Because of their years of experience Appellants knew that the effect of this publicity on the multiple seizures in strategically located parts of the United States would be that a tremendous blow will be struck thereby to the business of Appellee—a blow since it is of intangible injury to good will and reputation, which would be an injury from which it is difficult if not impossible to recover.[86] Publicity showing that Appellee has disproved all the unfounded claims of Appellants will never get the coverage which Appellants secured for their charges. Newspapers usually give prominence only to "attacks" and "bad" news. The charges can be cleared but the stigma of being the subject of drastic governmental action lingers on and on. Appellants have as to Appellee "stigmatized their reputation (and that of their product) and seriously impaired their chance to earn a living" by action which *they say* can "never be challenged in any court." It is believed "Our Constitution did not contemplate such a result." *United States* v. *Lovett,* 328 U. S. 303, 314.

Appellants in their famous "pressure" memorandum (R. 67-68) clearly indicated that their purpose was punishment rather than public protection. Protection of the public is not even mentioned when outlining their "pressure" scheme. Evidently the Appellants had some doubts about

[86] Publicity is recognized as a device whereby governmental punishment is and can be inflicted. Landis, *Administrative Process* (1938) pages 90, 108-110; Davis, *The Administrative Power of Investigation* (1947), 56 Yale L. J. 1111 at 1136.

getting by with their penalty pressure scheme, as they say in their "pressure" memorandum that they are going to make all the seizures they can up *"until an injunction is granted or the criminal case goes to trial"* (R. 67-68). They must have anticipated that an injunction would be granted in this case and that they would speedily lose in the criminal case, but they wanted to hurt Appellee as much as they could before that time. Appellants' whole far-flung geographic pattern of seizures reveals a deliberate plan to harass, oppress and ruin Appellee's business rather than determine the character of Appellee's labeling. The embargoes (R. 730, 751, par. 13) which Appellants persuaded state and local officials to place on Appellee's product were obtained by "untrue information" (R. 533, Item 11). The Appellants confirmed this by offering this evidence of untruth as a part of their own case (R. 531). Trial of a libel case is not even mentioned as a possibility in their "pressure memorandum." Clearly they wanted no trial to take place.

The Court found that:

> "The defendants have caused embargoes to be instituted and placed on Nutrilite prior to the institution of libel for condemnation proceedings in New York, New Jersey, Washington State, Florida, and various localities in the United States by requests to State and local health authorities, which embargoes naturally frightened agents, distributors and customers of Nutrilite and had very much the same damaging and injurious effect as the seizures. These embargoes obtained in widely scattered jurisdictions of the United States caused maximum and irreparable injury to plaintiff" (R. 769).

In the recent case of *Reilly* v. *Pinkus*, 338 U. S. 269, this Court had occasion to refer to the dissenting opinion by Justices Brandeis and Holmes in the case of *Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, 417 *et seq.* The language of that dissent is most appropriate to the

facts in the instant case, as that dissenting opinion was based on the reasoning that the order cancelling second class mail privileges of a newspaper for violating the Espionage Act was under the facts of that case, really a "punishment" rather than a preventive measure to protect the public. Mr. Justice Brandeis there stated at page 433:

> "The order . . . was clearly punitive, not a preventive measure; as all classes of mail except the second were, as the Postmaster General states, left open to it provided it had sufficient financial resources . . . The actual and intended effect of the order was merely to impose a very heavy fine, possibly $150 per day . . . But the trial and punishment of crimes is a function which the Constitution, Article 3, § 2, cl. 3, intrusts to the judiciary. *I am not aware that any other civil administrative officer has assumed, in any country in which the common law prevails, the power to inflict upon a citizen severe punishment for an infamous crime.* Possibly the court would hold that Congress could not, in view of Article 3 of the Constitution, confer upon the Postmaster General, *as a mere incident in the administration of his Department*, authority to issue an order which could operate only as a punishment. . . .
>
> ". . . What is in effect a very heavy fine has been imposed by the Postmaster General . . . It may be that the Court would hold, in view of Article 6 in our Bill of Rights, that Congress is without power to confer upon the Postmaster General . . . authority to inflict indirectly such a substantial punishment . . .
>
> "The punishment inflicted is not only unusual in character, it is, so far as known, unprecedented in American legal history. Every fine imposed by a court is definite in amount . . . But here a fine imposed for a past offense is made to grow indefinitely each day."

And at page 436:

> ". . . If, under the Constitution, administrative officers may, as a mere incident of the peacetime administration of their departments, be vested with the power

to issue such orders as this, there is little of substance in our Bill of Rights, and in every extension of governmental functions lurks a new danger to civil liberty." (Italics supplied.)

There is no doubt but that the Appellants have inflicted cruel and unusual punishment on Appellee without any semblance of a trial. The fact that this punishment is accomplished by seizing property rather than deprivation of personal liberty "makes it no less galling or effective than if it had been done by an Act (action) which designated the conduct as criminal." *United States* v. *Lovett*, 328 U. S. 303, 316. From January, 1949 on, Appellee has repeatedly called Appellants' attention to the fact that the best way a speedy trial could be had was for Appellants to file an injunction case in Los Angeles.[87] It was not until September, 1949, that the Appellants actually got around to filing such an injunction.[88] This clearly proves they did not want an early and speedy trial but wanted to unmercifully punish Appellee as long as possible.

The tremendous crushing effect of the multiple seizures imposing the sales loss of $100,000 per month, the demoralization of Appellee's sales organization and all the other effects listed in the Findings of Fact[89] certainly indicate beyond question that Mr. Justice Brandeis' words apply equally to the instant case.

In many cases this Court has invalidated state statutes imposing excessive penalities from which there was no adequate judicial protection and those cases contain rules of fundamental fairness flowing from the due process clause of the Fourteenth Amendment which Appellee believes are applicable in the instant case. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 347.

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[87] R. 608, 628-629. See also Appellants' brief page 7, note 3.

[88] Finding 37, R. 768.

[89] Finding 39, R. 769.

In our case the tremendous penalties inflicted by Appellants prior to any possible decision on the merits of Appellants' charges, in feigned enforcement of the Act for which no possible remedy exists, if a court of equity is helpless herein, clearly violate due process requirements. Appellants say Appelle has no statutory remedy at all against arbitrary, capricious and oppressive abuse of power by Appellants prior to a final decision in a libel case (if the statute here in question authorizes Appellants to do what they have done and is constitutional). See *infra* pages 151-165.

Further, the libel court may have the matter under consideration for a considerable period of time and then the Government may appeal the adverse judgment and all the time during which the appeal is pending, or at any other time, the libel court cannot grant an injunction stopping the Government from making further seizures. Since the statute does not provide, according to Appellants, any instance in which an injunction can be granted against them to prevent their abuse of power. Even if they lose a libel case they still can make seizures according to what Appellants say for they are always unstoppable regardless of what they do up until the libel courts act on these further seizures. As the libel courts would obviously dismiss these seizures as *res adjudicata* should not a court of equity have power to stop 5,000 seizures under such an obvious abuse of power? It is to be noted that Section 304(a) allows the Appellants to make unlimited seizures in cases where they win a judgment that a product is misbranded, but an alternative provision prohibiting Appellants from making multiple seizures in cases where the Appellants lose *is not contained in the statute,* so if resort to the equity courts is barred to prevent abuse even in such cases an appalling situation exists. Surely Appellants' contentions are unsound in view of the damage Appellants can do before a plea of *res adjudicata* can be heard!

Here the Appellants have "thrown the book" by bringing the *four* possible actions authorized by the statute, i.e., (1) criminal indictment, (2) a libel action, (3) multiple libel seizures, and (4) an injunction action. The multiple seizures which are the basis of the instant complaint were based on claims the basis of which had not then been authoritatively determined (although most definitely determined against Appellants by the Trial Court herein). Because of the multiple seizures Appellee is subject to the imposition of terrific penalties which are of such a character that money damages cannot possibly compensate for them, and even those damages which are allowable cannot be recovered.

In *Lipke* v. *Lederer*, 259 U. S. 557, a provision of the National Prohibition Act allowing a Collector of Internal Revenue to collect a liquor tax without hearing was held unconstitutional on the ground that it was not really a tax but a penalty. The Court said in part at page 562:

> ". . . We cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. . . ."

In the instant case that is exactly what has happened as enormous penalties have been imposed by secret findings and summary action of executive officers. *Cf. United States* v. *Constantine*, 296 U. S. 287.

It cannot be successfully argued that Congress intended the punishment result here achieved by Appellants because W. G. Campbell, then Chief of the Food and Drug Administration, in testifying at the hearings on S. 5, 74th Congress, on multiple seizures, said that his agency did not object to adequate legislative guarantees so that "undue penalties will not be visited through imprudent, intemperate, and extreme administrative methods of law enforce-

ment." Dunn, FEDERAL FOOD, DRUG AND COSMETIC ACT (1938), 1263.

The Court herein found (Finding 22, R. 736-764) that:

> "There are no separate issues of fact or law necessitating more than one such action. . . . These libel seizure actions having been instituted in widely separated jurisdictions in the United States inflicted *unnecessary punishment* . . . on the plaintiff." (Italics supplied.)

This Court said, *in Re Oliver, supra* at 278:

> "It is the 'law of the land' that no man's life, liberty or property be forfeited as a *punishment until* there has been a charge fairly made and fairly tried in a public tribunal." (Italics supplied.)

Yet secrecy is the earmark of Appellants' decisions herein.

It is significant to note that in *National Remedy Co.* v. *Hyde,* 50 Fed. (2d) 1066, (CCA, D. C., 1931) an action was brought to enjoin multiple seizures under circumstances almost identical with those presented here. The seizures were instituted under the Food and Drug Act of 1906 which was administered by the Department of Agriculture. The Court of Appeals, in reversing the action of the District Court in dismissing Appellants' complaint for injunctive relief, stated in part as follows at page 1068:

> "In *Ex parte Young,* 209 U. S. 123, it was held that, while there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, when such validity can only be determined by judicial determination and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction and denies them the equal protection of the law. In the present case, the action and proposed action of the Department would, under the averments of the bill, in effect deprive

> appellant of its property through the destruction of its business before the issues involved could be determined by the court. The result, therefore, would be little different than as though no provision had been made for judicial review. Such a course of conduct on the part of the Department amounts to arbitrary exercise of power, and is a deprivation of due process of law."

The awful and devastating consequence of these 11 seizures are shown by the record.[90] If Appellants had been allowed to use uncontrollable power to make 100 or more seizures, and they could have made 5,000, the consequences are a certain death of Appellee's business. The Court found (Finding 41, R. 769-770):

> That plaintiff would have been subjected to many additional seizures of its product throughout the United States in addition to the existing 11 seizures of its product, if not enjoined from so doing, is admitted by defendants. It was a general policy and plan of the defendants to make with all possible speed many seizures of plaintiff's product. Such additional seizures, and the product could be seized by defendants in the hands of more than 5,000 of plaintiff's distributors, would have the effect of destroying plaintiff's business prior to any possible adjudication of the disputed issues on plaintiff's labeling in any of the libel actions already filed or threatened."

Surely the irreparable injury inflicted herein is a punishment and most assuredly it has been inflicted in a fashion premeditatedly designed to make it a lasting non-eradicatable punishment. Never will the weapon of publicity to ruin a reputation be used with greater definiteness of purpose. A procedure which is so unfair for inflicting a penalty is not rendered fair by using it under the label of "public protection" in an attempt to expand Appellants' powers. *Cf. Gegiow* v. *Uhl*, 239 U. S. 3, 10; *Waite* v. *Macy*, 246 U. S.

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[90] Finding 39, R. 769.

606, 608. Power is certainly used for abusive purposes when the shock of its impact is so shatteringly unreasonable.

Surely the use of multiple seizures here as a punishment as inflicted by Appellants under the facts in this case was not really authorized by the Congress in Section 304(a) of the Food, Drug and Cosmetic Act and if authorized by that provision Appellee respectfully submits that it violates the due process of law guaranteed to it by the Fifth Amendment. See *infra* pages 151-165.

(g) Conclusions on Statutory Violation

Considering all of the facts and absence of facts herein reviewed, Appellee earnestly urges that what Appellants have done cannot reasonably be said to be a compliance with that part of Section 304(a) here involved. In all the annals of administrative agencies it is not believed that there is a record revealing so flagrantly, so many violations of fundamental fairness as that revealed by the Record and Findings of Fact in this case.

It is developed in other parts of this brief that Appellee is entitled under the due process clause to be treated fairly and that statutes should be read so as to require this treatment if it is at all possible to do so. A purpose of allowing uncontrollable action under a provision as bitterly fought in the Congress as multiple seizures should not lightly be attributed to the Congress.[91] The language used as well as its legislative history indicates that under the facts herein the Appellants have violated the statutory mandate.

12. Libel and Law Courts Offer No Remedy Against Appellants' Arbitrary, Capricious and Oppressive Action

Appellants argue (pp. 65-74) that Appellee has an adequate remedy at law so the District Court lacked jurisdiction. The remedy said to be adequate is that offered by the

[91] See *Cavers, Supra*, note 83.

libel courts. This section of Appellee's brief shows that such courts offer no adequate remedy for the irreparable injury herein complained of.

(a). Libel Courts Provide no Stay of Further Seizures Pendente Lite

Appellants say that Appellee has a remedy against multiple *trials* of the multiple *seizures* in the right given to consolidate the libels into one case for trial. This is an inadequate remedy and, in fact, no remedy at all for it is the *seizures* which are irreparably injuring Appellee here. Neither a libel court nor a court in which the libels are consolidated has any power to stay further seizures until there has been a trial of a consolidated or a libel action involving instances like this case where the same issues of law and fact are involved in multiple seizure actions. Also, while the pending cases are being consolidated Appellants could ruin Appellee beyond any possible recoupment by a victory in the libel case by making the possible 5,000 seizures (Finding 41, R. 769-770) in a week through use of their mimeographed papers and telegram plan (R. 67).

Appellants have made 11 seizures and admittedly had their seizure papers all "mimeographed" up and telegrams were to be used so they could "speedily" make more seizures as a part of the "pressure" campaign outlined in Appellants' "pressure memorandum."[92] Appellee has more than 5,000 distributors[93] from whom seizures could be made, the names and addresses of each is presumably in Appellants' possession (R. 533-534, 767) and it is conceivable that the seizures would have numbered in the hundreds and Appellee's business would have practically been brought to a standstill within a few days if the injunction had not been granted herein to stop seizures on the basis of the Kingsley

[92] Finding 32, R. 766, R. 67.

[93] Finding 3, R. 757.

decisions. (Finding 41, R. 769-770). The "Pressure Memorandum" does not say seizures are to stop if a consolidation of any of the libels for trial is effected.

Appellants can go back to the same distributor and make a seizure every time he receives a shipment and harass the distributor out of existence—they made two seizures in Belleville, New Jersey [94] and two in Chicago.[95] Appellee is really at the mercy of uncontrollable destruction by Appellants if a court of equity is powerless to aid it.

Appellants when contacted by Appellee in November, 1948 after 3 seizures had been made, did not indicate they would stop seizures if these 3 were consolidated into one (R. 311, 327, 764), and have made no promise to stop further seizures if the 11 are so consolidated. In fact they have indicated just the opposite.[96] This means the next 11 or 100 cases would be consolidated into another trial and then the next seizures so consolidated and so on and on as more cases are filed. There is no special power given by the statute to any court to consolidate into one trial the consolidated trials and from the obstructive, delaying and technical tactics adopted by Appellants so far on the attempt to consolidate the first 11 seizures, it is obvious they would oppose consolidation of the consolidated trials on that ground.[96a]

There is no way *under the Act* to stop Appellants from further seizures until one of the consolidated trials has

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[94] Findings 16 and 31, R. 761, 766.

[95] Finding 31, R. 766.

[96] Finding 32, R. 766. See also R. 412.

[96a] Appellants, in footnote 40, p. 66 of their brief contend a libel case cannot be removed to Appellee's home district where Appellants on September 22, 1949 filed an injunction suit involving identical issues (R. 768). Appellants do not mention removal provisions of the new Judicial Code, 28 USC § 1404 as interpreted in *United States* v. *National City Lines*, 337 U. S. 78; *Ex Parte Collett*, 337 U. S. 55 and *Kilpatrick* v. *Texas and Pacific R. Co.*, 337 U. S. 75. See note 35 *supra* page 17.

been concluded. The statement by Appellants (pp. 66-67) that if Appellee had moved to consolidate in the Fall of 1948 a trial could have been had in a libel court by now ignores Appellants' delaying, obstructive, punitive and other tactics outlined herein which have delayed a decision for a year on the first motion to consolidate. (Finding 37, R. 768.) It cannot, therefore, be said that the power to consolidate the libels under the facts in this case is an adequate remedy so as to defeat an action for an injunction.

This Court has held that where particular administrative orders or action could not be suspended *pendente lite* under applicable statutes to prevent irreparable injury *pendente lite*, equitable relief was guaranteed by due process as the statutory remedy is inadequate. In *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, the Court held that a rate refund order violated due process since there was no intermediate suspension of the order pending judicial review. The Court said at page 303:[97]

> "A different question would be here if such a suit (i.e., independent suit for review) could be maintained with an intermediate suspension of the administrative ruling."

In *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, the Court reversed a three-judge court and upheld a temporary rate fixed by the Pennsylvania Public Utilities Commission but held that if a utility company was not protected against loss by the remedy afforded by a Pennsylvania statute until the merits of the rate increase were settled the remedy was clearly inadequate. There the question of inadequacy of the remedy provided by state law was carefully examined by the Court because the Johnson Act removing Federal jurisdiction where a "plain, speedy and efficient remedy may be had, in law or equity in the courts of such state"

[97] See *supra* pages 49, 74 for prior reference to this case.

was raised as bar to equitable jurisdiction. Of the Pennsylvania statute the Court said at page 110:

> ". . . The remedy at law by appeal is ineffective to protect the utility's position *pendente lite*. The supersedeas does not postpone the application of the temporary rates. The statutory court had jurisdiction of the Bill."

And in *Porter* v. *Investors Syndicate*, 286 U. S. 461, the Court said at pages 470-471:

> "Where ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, here is no deprivation of due process. . . . But where either the plain provisions of the statute . . . or the decisions of the courts in interpreting the Act . . . preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified."

It is believed that under the rule relied upon in the above decisions and in spite of distinctions which can be drawn, Appellee has a right to suspension of further seizures pending a decision in the libel courts where, as here, the merits of its labeling is raised under facts indicating no possible injury to any person except Appellee *pendente lite*. No such suspension can, however, come from a libel court. Nor can a libel court stop the use of multiple seizures for "punishment" only as Appellants are using them here. (See *supra* pages 81-93.)

(b) Libel Courts Cannot Consider Arbitrary, Capricious and Oppressive Conduct

The libel courts would not afford Appellee an adequate remedy because the *sole issue* in a libel case is whether Appellee's pamphlet is "misleading in any particular" (Sec-

tion 403(a), 502(a)). The Appellants would not and could not be parties to such suits and, therefore, the libel courts could not decide the issue of arbitrary, capricious and oppressive actions by Appellants or restrain their unlawful, arbitrary, capricious and oppressive conduct. If Appellee's only remedy is in the libel courts it will never get a trial on whether Appellants violated the statute or the constitution by the conduct complained of herein. The cases cited by Appellants (pp. 39-45, brief) involving administrative action and a later hearing, i.e., rent, price, tax assessment, etc., are cases where the later hearing involves the very administrative action taken. That is not true in the instant case as the later hearing in the libel court can never involve whether Appellants were arbitrary in their administrative action in authorizing multiple seizures. Appellants here really argue Appellee is never entitled to have any court inquire into whether they acted illegally in such authorizing decisions. That was not the decision of the Court in the cases they cite and it is most respectfully believed that such a construction clearly violates the due process clause.

It has been held that the legal remedy is never adequate unless it covers the entire case made by the bill seeking relief in equity. In *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620, 628, the Court said:

> "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity."

Again in *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, in a suit to enjoin collection of local and state taxes, it was contended that since the state statue provided that taxes wrongfully collected should be refunded, there was an adequate legal remedy, but the Court found that recent court decisions had modified this statute. The Court said at page 520:

"But were it otherwise, Section 12 clearly applies to state taxes alone, while the bills of complaint herein have to do with both state and local taxes. A remedy at law cannot be considered adequate so as to prevent equitable relief unless it covers the entire case made by the bill in equity. Were we to require a dismissal of these bills as to the state taxes, retain them as to the local taxes, *we should multiply suits, instead of preventing multiplicity of suits. It is a familiar maxim that 'a court of equity ought to do justice completely, and not by halves,' and to this end, having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law.*" (Italics supplied)

Appellee in its complaint sought to enjoin the unlawful, arbitrary, capricious and oppressive conduct of Appellants and also questioned the constitutionality of the statute under which they instituted the libels. It was only in the Court below that those questions could have been presented as it is the only court where personal jurisdiction can be acquired over Appellants. The libel courts can have no jurisdiction over the issues or defendants here before the Court. The cases cited *infra* pages 114-118, establish that there is no place in our government under our Constitution for the exercise of purely arbitrary action and that the Courts can enjoin such action where no other adequate remedy exists. Clearly the libel courts cannot offer a remedy against illegal actions of Appellants here as it has no jurisdiction over such an issue or over the Appellants.

(c) Libel Courts Cannot Give Relief for Damages Suffered

The libel courts do not afford Appellee an adequate remedy because they cannot protect against loss of the value of the seized articles (which will be unsalable when recovered, R. 769) nor can these courts give damages for

the intangible loss resulting from destruction visited upon Appellee's business (Finding 39, R. 769).

This Court has recognized inability to recover damages as a proper ground for the equitable relief of injunction. In *Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290, a gas company's application for higher rates was denied. On an appeal to the State Supreme Court a supersedeas *pendente lite* was denied. An action was then brought before a Federal three-judge court which dismissed the bill. This Court in holding that the three-judge court was in error, said at page 293:

> "Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they are now limited. They have done all they can under the state law to get relief and cannot get it. If the Supreme Court of the State hereinafter shall change the rate, even nunc pro tunc, the *plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. . . .*" (Italics supplied)

Just as in the instant case there is no remedy in the libel courts for what Appellee may lose before or after it prevails in those courts.

It might be said that Appellee could recover in damages from Appellants for the value of the seized articles and for loss incurred by the destruction of its business and the injury to its reputation and good will. Appellants admit no such remedy exists (Compl. Para. 16, R. 731, R. 752) and it must be conceded that the decisions of the courts do not offer Appellee much hope of relief in this direction See *Wilkes* v. *Dinsman*, 7 How. 89, 130-131; *Spalding* v. *Vilas*, 161 U. S. 483, 498-499.

Thus recovery in any suit for damages against the Appellants personally would be at best doubtful. This doubt alone has been recognized by this Court as proper grounds

for the issuance of the equitable relief of an injunction. In *Dawson* v. *Kentucky Distillers and Warehouse Co.*, 255 U. S. 288, at page 295 the Court said:

> "It is well settled 'that if the remedy at law be doubtful a court of equity will not decline cognizance of the suit.'"

And in *Davis* v. *Wakelee*, 156 U. S. 680, the Court said at page 688:

> "In the uncertainty which appears to exist .... we think it may be fairly said that the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction. It is a settled principle of equity jurisprudence that if the remedy at law be doubtful a court of equity will not decline cognizance of the suit.... *Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.*" (Italics supplied)

Also, the injury to Appellee and to its distributors has been so great and will be so great if Appellants make further seizures, that it is doubtful that any or all of the defendants have sufficient funds to pay a judgment for the amount of such injury. Moreover, even assuming that Appellants would be held liable in an action for damages as far as damage to the seized articles is concerned, money damages recovered from Appellants would be an inadequate remedy. It is this intangible crushing effect on Appellee's good will and reputation which cannot be measured in dollars and cents against which relief is here requested. Even in a case where there could be recovery for the value of goods taken the Court has recognized that relief is inadequate as to the loss of business and good will where as in the instant case it is difficult to evaluate such losses in terms of money. *Watson* v. *Sutherland*, 5 Wall. 74, 80.

So if Appellee admittedly cannot recover even for loss of the seized goods which is just a small part of its total loss, the greater part being the "loss of trade destruction

of credit, and failure of business prospects," those "collateral or consequential damages . . . for which compensation cannot be awarded in a trial at law," (*Watson* v. *Sutherland, supra,* p. 80) it should be clear that it had no adequate remedy in the libel courts and the injunction was necessary and proper.

Congress knew very well what multiple seizures meant and certainly never intended their use as Appellants have used them in this case. For example, Senator Bailey during the debate on this provision said in part:

> "I am selling my goods in 48 states; he seizes them in 40 states, and, even though I go into court a thousand times and prove he is wrong, my business is gone, for a man cannot be universally disgraced by his Government and hope to recover in a lawsuit."

79 Cong. Rec. 4917.

(d) MULTIPLICITY OF ACTIONS NOT AVOIDED BY LIBEL COURTS

Appellants in their brief (pp. 67-71) discuss only multiplicity of trials—*not multiplicity of seizures.* And there is quite a difference. To hold that Appellee had an adequate remedy in the libel courts would necessarily mean the staying of the many actions involving the same issues of fact and law and prevention of further seizures while one action is tried. And as already stated herein the libel court cannot do this. In fact, if equitable relief is not granted to stay a multiplicity of further seizures there would have to be the trial of the consolidated libel actions, or the injunction action, a possible trial of the action against Appellants for personal liability and a trial to determine the constitutionality of that section of the Food and Drug Act under which Appellants acted.

While any or all of these actions are going on the libel courts cannot stop further seizures. Even after one of these cases has been decided *and the labeling issue has been decided in Appellee's favor,* the libel courts (and under Ap-

pellants' theory no other Court) cannot stop Appellants from seizing Appellee's product on the same labeling allegation. To be sure a plea of *res adjudicata* would probably get such actions dismissed but that could come under Appellants' theory, only *after* the seizures—possibly 5,000 of them in a week. See page 89 supra. Under Appellants' theory Appellee must look to the libel courts which could do nothing until after the seizures, so use of the seizures as a punishment device could not be stopped by a court of equity, no matter how unlawful, arbitrary, capricious and oppressive the seizures are, according to Appellants. The Act says Appellants can make all the seizures they want to when once the Government wins a case against such labeling but it does not say the Government must stop seizing when it loses on the issue of labeling.

In the case of *Smyth* v. *Ames*, 169 U. S. 466, where an injunction was granted against the enforcement of rates for transportation imposed by a Nebraska statute making carriers not only liable to individuals for matters prohibited by the statute but also liable for fines on each offense, the Court said at page 517:

> "The transactions along the lines of any one of these railroads out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree according to the prayer of the bills, *would avoid a multiplicity of suits*, and give a remedy more certain and efficacious than could be given in the proceeding instituted against the company in a court of law, for a court of law could only deal with each separate transaction involving the rates to be charged for transportation." (Italics supplied)

So in this case the granting of the injunction certainly avoided a multiplicity of suits.

> "It is a familiar maxim that a court of equity ought to do justice completely, and not by halves, and to this end *having properly acquired jurisdiction of a cause*,

for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law." (Italics supplied)

Greene v. *Louisville and I. R. Co.*, 244 U. S. 499, 520. Cf. *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (equity required return of excessive rents. "To be sure such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available," pp. 399).

In *Landis* v. *North American Co.*, 299 U. S. 248, it was held that a Federal Court has inherent power to stay proceedings in a case on its docket to await the outcome of a test case in another jurisdiction involving the same issues even though the parties are *not* the same. And in *Stark* v. *Wickard*, 321 U. S. 288, 310, this Court said: "If numerous parallel cases are filed, the Courts have ample authority to stay useless litigation until the determination of a test case."

In *Ex Parte Young*, 209 U. S. 123, 160, the Court said, "It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally. . . ."

In *Lee* v. *Bickel*, 292 U. S. 415, 421, Mr. Justice *Cardozo* said the Court there had jurisdiction, "As to this we are not in doubt, the multiplicity of actions necessary for redress at law being sufficient, without reference to other considerations, to uphold the remedy by injunction. *Wilson* v. *Illinois Southern R. Co.*, 263 U. S. 574; *Hill* v. *Wallace*, 259 U. S. 44, 62."

Since libel courts cannot stop a multiplicity of suits, the trial court acted properly herein. No claim is made as Appellants seem to assume (Brief, pp. 67-71) that jurisdiction of the Trial Court was based upon multipilicity *alone* so the the authorities cited by Appellants are inapplicable. The Appellants cite *National Remedy Co.* v. *Hyde*, *supra*, and knowing it is completely against them say the statute it applied was different from the present act. Un-

biased writers disagree entirely with Appellants on this point saying the 1938 Act in Section 304 "codifies"[98] into its written provisions the principles of that case.

Finally the oft repeated irrelevant claim in Appellants' brief that a multiplicity of seizure actions was a regular thing under the Food and Drug Act of 1906 (See Brief, pp. 35, 52) is not exactly accurate—at least not after the *National Remedy* case stopped arbitrary, capricious and oppressive use of multiple seizures.

13. The Decisions Authorizing Multiple Seizures are Reviewable Under the Administrative Procedure Act

All constitutional questions aside, the question is presented as to whether the determinations authorizing the institution of multiple seizures against Appellee's product are reviewable under Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 USC § 1001 et seq.). Appellee respectfully submits that they are under the facts of this case and that they are in fact the very type of administrative evils sought to be cured or minimized by the Act. Appellants argue the contrary in their Brief (pp. 60-61).

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[98] See Markel, *The Impact of the Federal Administrative Procedure Act on the Federal Food, Drug, and Cosmetic Act* in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES (New York University School of Law, 1947) at page 397:

> "The purpose of this provision (Section 304(a)) is to avoid unnecessary interference with the business of the producers until an issue of alleged misbranding has been determined by the proper tribunal. The 1906 act did not contain a comparable provision. However, in at least one instance (citing the National Remedy case, *supra)* the Court enjoined the institution of more than one seizure because it appeared to the Court that an unlimited number of seizures constituted an unwarranted interference in the light of the relative importance of the issue of misbranding involved. *This section is virtually a codification of the principle of that case.*" (Italics supplied.)

Mr. Markel was formerly senior attorney for the Food and Drug Administration so he is highly qualified to make such a statement.

(a) Right of Review

Section 10(a) (5 USC 1009a) of the Administrative Procedure Act granting the right of review provides as follows:

> "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Clearly Appellee has suffered "legal wrong" by the unauthorized and arbitrary action of Appellants in instituting carefully planned and located multiple seizures on a nationwide basis which threaten to destroy Appellee's entire business and good will. Conceding *arguendo*, that "legal wrong" might not exist if Appellants had *fairly* reached their determinations, such is not the case here, where Appellants' determinations were not fairly arrived at and where they were not supported by substantial evidence. It is the fact that Appellants' determinations were arbitrary and capricious which has made the damage to Appellee a "legal wrong" within the purview of Section 10(a) of the Act. Appellants themselves cannot be their own judge of the legality of their own action with no agency or court ever passing on the validity of their actions authorizing multiple seizures. The Administrative Procedure Act gives the courts jurisdiction to judge the legality of such action.[98a]

(b) The Decisions in Question Were Final As to Use of Multiple Seizures

Section 10(c) of the Administrative Procedure Act limits review to "final" administrative action. It provides in part:

> "Every agency action made reviewable by statute and every final agency action for which there is no

[98a] Cf. *United States* v. *Morton Salt Co.*, 70 Sup. Ct. 357, 364.

> other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon review of the final agency action."

Appellants attempt to make much of the last quoted line (p. 49, brief), yet at the same time in reality nullifying their own argument by contending the "final" decisions authorizing use of multiple seizures are never reviewable by any court—and certainly the libel courts have no jurisdiction to review them. The first quoted sentence was obviously intended to negate any intention to make merely preliminary or provisional orders reviewable. As to both sentences, however, it cannot be said that the administrative determinations in the instant case were merely preliminary, procedural or intermediate. The character of the decisions must be determined by their effect and, needless to say, as far as the authority to carry out multiple seizures is concerned these determinations were and are "final." Without the decisions the multiple seizure weapon is not usable—Appellants cannot get into the libel courts more than once unless these administrative decisions are made. Counsel for Appellants said to the Trial Court:

> "Those (multiple seizure) suits could only be brought if this administrative determination were made. If the administrative determination were not made these suits could not be brought" (R. 8).

There is nothing preliminary about decisions which would permit Appellants to wipe out an entire business enterprise by the drastic device of multiple seizures. And "overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect." *Powell* v. *United States*, 300 U. S. 276, 285. "In determining what is due process of law regard must be had to substance, not to

form." *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 235. The same rule should apply to reviewability to prevent injustice under the broad provisions of this new remedial Act. The use of libel court process to effect seizures when no libel court can stop the seizures does not distinguish this case from executive seizures. Looking through fiction to fact these seizures are in substance executive seizures. The courts are not real actors in this picture until after the seizure takes place—their processes under this statute can be and are automatically misused by Appellants. Each of the six judges who has considered any phase of this litigation has indicated adverse reactions to Appellants actions. (See note 55 *supra* p. 40.)

Since the determinations are final in their serious and disastrous impact upon Appellee's valuable property rights, the only other qualification which might preclude judicial review under this Section of the Administrative Procedure Act would be the existence of another adequate remedy. As has been stressed elsewhere in this brief, Appellee is not afforded an adequate remedy in any other court for the trials of the seizure actions not only come too late, but do not and could not involve the question decided in the administrative determinations, nor can the libel courts stop multiple seizures. (See *supra* pp. 94-97.)

The finality of the determinations and the complete absence of any other adequate remedy clearly makes the determinations "reviewable acts" within the purview of Section 10(c) of the Administrative Procedure Act. Appellants' reliance upon *Chicago & Southern Air Lines* v. *Waterman,* 333 U. S. 103, is not believed to be sound as that case seems to have turned on the political, international relations character of the question there involved. The difference in factual foundation of *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, makes it likewise unreliable here.

(c) The Scope of Review

Subsection (e) of Section 10 provides, in part, that the reviewing court:

> "shall hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power privilege or immunity; (e) in excess of statutory jurisdiction, authority, or short of statutory right; (4) without observance of procedure required by law. . . ."

The action of the Court below clearly did not exceed these established bounds of judicial review for subsection (e) quoted in part above positively states that a reviewing court "shall hold unlawful . . . agency action, findings and conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" . . . . The present action certainly falls directly within the scope of review authorized by the language quoted.

(d) The Instant Case Does Not Fall Within the Exceptions to Review Under the Act

Section 10 of the Act excepts from judicial review under the Act any agency actions (1) where statutes preclude judicial review or (2) where the agency actions are by law committed to agency discretion.

In respect to the first exception, it is unusual for statutes to specifically preclude judicial review of administrative action. However, the courts have in some instances construed statutes by their silence as manifesting a legislative intent to withhold judicial review. And Appellants place great reliance on the decision of this Court in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297 holding that although the statute there involved did not specifically preclude judicial review the intent of

Congress to preclude judicial review was manifested by the omission of such a provision. *Stark* v. *Wickard*, 321 U. S. 288, 309-310, and *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 184, state an opposite conclusion on distinguishable facts. In those cases the decisions up for review were made after notice and hearing so the facts there are unlike those in the instant case. The *Switchmen's Union* case does not hold that a decision *ex parte* without hearing is non-reviewable. *Cf. Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 306 U. S. 56, 60; *Columbia Broadcasting Co.* v. *United States*, 316 U. S. 407.

In the legislative history section of this brief *infra* pages 139-143, Appellee quotes the Congressional report which scuttles Appellants' whole argument on "silence" on judicial review (pp. 58 et seq.) and refutes Appellants' section of its brief entitled "No Review of the Administrative Finding of Probable Cause Was Intended." Appellants did not quote the explanation given by the Committee and set forth *infra* pp. 141-142 for that report shows the Committee thought the courts were always open to stop illegal action and that was the reason for the "silence" in the Act on this subject.[98b] Quite a different picture from that painted in Appellants brief!

Can it justifiably be said that there should be read into Section 304(a) of the Food, Drug and Cosmetic Act a Congressional intent to withhold *under any circumstances* judicial review of determinations of probable cause? It is respectfully submitted that such an intent should not be read into the statute on the true legislative history. Aside from such history, the very nature of the determinations and the tremendous and serious impact of widespread multiple seizures as a result of such determinations would appear to demand that the existence of a nationwide business should not wholly depend on the whim and caprice of an

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[98b] *Slocum* v. *Delaware, Lackawanna & Western R. Co.*, No. 391, April 10, 1950 on intentional absence of judicial jurisdiction to achieve uniformity is not in point under such a legislative history.

administrative officer. To state contrary to its own report that Congress intended to preclude judicial review despite the immediate and direct damaging consequences of the determinations, would be an injustice to the intelligence, candor, wisdom and responsibility of that legislative body.

The question remains, however, as to whether the determinations under Section 304(a) of the Food, Drug and Cosmetic Act are "agency action .... by law committed to agency discretion" within the intent and meaning of the exception to judicial review provided for in Section 10 of the Administrative Procedure Act. The exact scope and meaning of this exception would appear to be somewhat ambiguous but it is suggested that it merely restates a limitation which the judiciary itself had applied without the necessity of authorizing legislation. It is obvious, not only from the legislative history of the Administrative Procedure Act, but also from other provisions of the Act, that this withholding of judicial review does not apply in all cases where "agency action" is in the broad sense "discretionary." The following colloquy in the Senate when the Administrative Procedure Bill was under discussion by its Author, Senator McCarran, specifically discloses that not all exercises of "agency discretion" were to be excepted (92 Cong. Rec. 2153-2154):

> "Mr. Donnell: 'It has occurred to me that the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been an abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?'
>
> "Mr. McCarran: 'Mr. President, let me say, in answer to the able Senator, that the thought uppermost in

presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review. . . .

"Mr. Donnell: 'But the mere fact that a statute may vest discretion in an agency is not intended by this bill to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?'

"Mr. McCarran: '*It must not be an arbitrary discretion.* It must be a judicial discretion; it must be a discretion based on sound reasoning.' * * * (Italics supplied.)

"Mr. Austin: 'Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review.'

"Mr. McCarran: 'That is correct.'

"Mr. Austin: 'And is it not also true that because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned.'

"Mr. McCarran: 'That is true; the Senator is entirely correct in his statement.'"

To further rebut the contention that all exercises of agency discretion are excepted from the judicial review provided for in Section 10 of the Act, it should be noted that subsection (e) specifically provides that it shall be the duty of the reviewing court "to hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law." (Italics supplied.) It is submitted that the colloquy quoted *supra* and the foregoing provisions of subsection (e) preclude any contention that *all* exercises of agency discretion are beyond judicial review. Appellee's complaint charged and the Court below found, in effect, that the determinations of the Appellants were arbitrary abuses of the discretion vested in them. It is obvious that

the administrative "discretion" involved here is not "absolute" for otherwise Congress would not have required the determinations of probable cause to be based "upon facts found."

Even if the Administrator has discretion, incident to his power to protect the public, this does not mean that every sort of action the Administrator may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by *mere executive fiat*—the contrary is well established. *Sterling* v. *Constantin*, 287 U. S. 378, 400-401.

This Court in its recent decision in *Wong Yang Sung* v. *McGrath* (No. 154—October term 1949) has indicated that the Administrative Procedure Act is to be broadly construed so as to further the legislative intent to sufficiently safeguard private citizens and property from arbitrary and biased administrative action. The long history of the struggle to enact a statute was reviewed at length in the opinion of this Court. It is obvious that in many instances the apprehension of many regarding the "multiplication of federal administrative agencies and expansion of their functions to include adjudications which have a serious impact on private rights" were well-founded. This instant case is a graphic example of the unbridled exercise of administrative power put to arbitrary and biased use. It was stated by this Court in the *Wong Yang Sung* case, *supra:*

> "The Act represents a long period of study and strife; it settles long continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. . . . Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."

So in the instant case, it would certainly be a "disservice to our form of government and to the administrative process itself" if it should be held that the determinations involved are not subject to judicial review, for it is obvious that "the evils" the Act "was aimed at appear." Surely the consternation and embarrassment of Appellants should not be enough to preclude the Act's obvious applicability. The allowable limits of discretion are for the courts to decide and the law is well settled by the Administrative Procedure Act and by the decisions of this Honorable Court that one who has a discretion cannot exercise it arbitrarily, capriciously and oppressively. No government official has such unrestrainable power. *Sterling* v. *Constantin, supra.*

14. The Court As a Court of Equity Had Jurisdiction to Determine Whether the Decisions of Appellants Were Made Arbitrarily, Capriciously, Unreasonably and Unlawfully

If the arbitrary action of the Appellants in making their decisions was within judicial cognizance, it certainly was not error for the Court below to consider the decisions of the Appellants, as well as the facts and circumstances surrounding those decisions,[99] in order to determine this issue. This is not a case, as Appellants would lead the Court to believe, where the Court below sought to substitute its own judgment for that of Appellants. On the contrary, the Court below found that Appellants had no rational basis whatsoever for their determinations and that the same were not justified under any view of the facts.[100] The cases herein establish that there is no place in our system of government for such an exercise of arbitrary power and that contrary to Appellants' contention (P. 65, Brief) courts of equity can stop such illegal action.

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[99] *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 704-705.

[100] Findings 12, 17, 18, 29, 30, 31, 32, 35, 42 and 43 (R. 758-770).

All constitutional questions aside and conceding, *arguendo* that the Court below did not have the power to substitute its judgment for that of Appellants, the question remains as to whether or not the District Court had jurisdiction as a Court of equity to inquire into and give relief from the unlawful, arbitrary, capricious and oppressive conduct of Appellants which the record in this case so fully reveals. Appellants make quite a point of this in their brief (pp. 52-74). One answer is that being a Constitutional Court properly convened the Court had jurisdiction to dispose of all questions in the case and the section of this brief *infra* pages 118-124 covers this point. Another answer is that the Administrative Procedure Act confers jurisdiction as is set forth in the preceding section herein. But aside from such considerations Appellants are wrong in their claim of a lack of power in a court of equity to enjoin illegal action of government officials.

In *Dismuke* v. *United States*, 297 U. S. 167, 172, it was held that the determination of an administrative official will be reviewed by the Court and will not be accepted where:

> "he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence . . . or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which Congress has authorized."

In *Garfield, Secretary of Interior* v. *Goldsby*, 211 U. S. 249, this Court stated at page 262:

> "But, as has been affirmed by this Court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

In *Waite v. Macy*, 246 U. S. 606, the Court in a decision by Mr. Justice Holmes granted an injunction to void a regulation excluding Prussian blue tea, non-deleterious in character, on the ground it exceeded the statutory powers conferred. The Court, through Mr. Justice Holmes, said at pages 608-609:

> "The government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of the board.
>
> "No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. ... ."

In *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, the Court through Mr. Justice Stone in granting relief from unauthorized administrative action in an immigration penalty case, stated at pages 335-336:

> "The action of the Secretary (of Labor) is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority . . . whether there was any evidence before him to support his determination . . . and whether the procedures which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized."

and at page 339:

> "The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly, to the end that he may consider all evidence relevant to the determination which he is required to make, that he may arrive justly at his conclusion, and preserve such a record of his ac-

tion that it may be known that he has performed the duty which the law commands."

The opinion in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 has been constantly cited by this Court as expounding the established proposition that the courts have jurisdiction to grant relief to a party injured by the unauthorized act of a public official. In that case, it was stated at page 108:

> "That the conduct of the post office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, this Court, in holding that administrative action violated the commands of the Fourteenth Amendment, stated at pages 369-370:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

The opinion further recognized that the courts must have power to grant relief under such circumstances for otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer whose action is unauthorized by any law, and is in violation of the rights of the individual. *Cf. Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407 and *Buchanan*

v. *Worley*, 245 U. S. 60 where relief was granted when the result of the illegal action was pressure on others not to contract with the plaintiff just as in the instant case.

The jurisdictional tests established in the cases cited *supra* are clearly met in the instant action. Appellee, in its complaint, not only charged, and subsequently proved in the trial below, that the decisions by Appellants were made illegally; but also charged and proved that such decisions as well as other actions by Appellants, were *arbitrary, capricious* and unreasonable, and that Appellee thereby suffered irreparable damage. In view of the issue as to arbitrary conduct which was before the Court below, it was certainly the duty of that Court to receive evidence relating to how the so-called decisions of probable cause were arrived at. To contend that the decisions by Appellants were beyond judicial inquiry irrespective of charges made, and in fact established, would place in the hands of such administrative officials an administrative power of such tremendous and unlimited impact which would be not only alien to our entire constitutional scheme but unparalleled in any governmental system adhering to the principles of justice under law. Courts of equity have always had jurisdiction to give relief under the circumstances of this case.

15. Three-Judge Court Must Try and Decide All Issues of the Case

(a) The Statute Gives the 3-Judges Jurisdiction to Decide All Issues in the Case—Text and Legislative History

There are three three-judge court statutes—one relates to Interstate Commerce Commission cases, another to applications for injunctions to restrain the enforcement of state statutes, and the third to such applications with refer-

ence to Federal statutes. The two latter statutes are the same in wording (28 USC 2281 and 2282). All are governed as to composition and procedure by the same provisions (id. 2284). The statute respecting three-judge courts in such cases respecting Federal statutes was deliberately drawn to parallel the earlier statute applicable to such cases involving state statutes (House Report No. 1679, 77th Congress, pp. 6, 8; and see also 88 Cong. Rec. 7045 in the Senate). This Court customarily refers to precedents under any of them in deciding cases involving any one of them. Appellee does the same herein.

The statute makes detailed provisions for the determination of all issues by the full court of three judges. Thus the court of three judges, when duly designated, "shall serve as members of the court to hear and determine the action or proceeding" (28 USC 2284(1)). They do not serve merely to determine the constitutional issues but "to hear and determine *the action or proceeding.*" Obviously the words "to hear and determine" may not be limited to hearing and determination of constitutional issues only, because they expressly relate to "the action or proceeding."

The scheme of the statute thus seems very plain. It provides, first, that *applications* for injunctions must be "heard and determined by a court of three judges" (28 USC 2282). The three judges "*shall* . . . hear and determine *the action or proceeding*" (28 USC 2284(1)). The only exceptions are that (1) the original district judge may grant a temporary restraining order pending hearing thereon by the full three-judge court and (2) any one of the three judges may perform such functions as do not involve the trial of the case or the entry of any judgment subject to appeal to the full three judges from any action by a single judge.

The foregoing detailed provisions of the statute were adopted in 1942 and, in combination with other provisions of a similar nature already existing, were restated in the new Judicial Code as quoted above. The latter embodies

mainly the provisions of the 1942 statute (56 Stat. 198 at 199, formerly 28 USC 792). The report and hearings in the House of Representatives are embodied in a single document (Rep. No. 1677, 77th Congress, on H. R. 4812) which contains the following:

> "Mr. Kefauver * * * The bill provides that in preliminary matters where the case is tried by a three-judge court that one judge may handle the proceedings and enter all orders required by the Rules of Civil Procedure up to the time of final action in the case. The matter of determining the ultimate decision on the facts or on the law is, of course, left to the three judges. * * *"

See also the Conference Committee report at 88 Cong. Rec. 3069. The Senate Committee, although it redrafted the bill, similarly reported its purpose as being to permit "any one of the judges designated to the three-judge court . . . to perform all preliminary functions" except that "the actual trial of the final issues must be by the full three-judge court" (88 Cong. Rec. 1970).

(b) The Decisions of This Court Hold the 3-Judge Court Has Jurisdiction to Decide All Issues

In *Louisville & N. R. R. Co.* v. *Garrett*, 231 U. S. 298, constitutionality was raised under both the federal and state constitutions. Decision of the latter would of course make unnecessary decision of the former question, if the court should hold that there was invalidity under the state constitution. The question whether, in these circumstances, the federal three-judge court had jurisdiction was squarely raised and the Court said:

> "Because of the Federal questions raised by the bill the . . . Court had jurisdiction and was *authorized to determine all the questions in the case.* . . . Where such a (constitutional) question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress

> to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution *and statutes* were therefore before the . . . Court and the appeal brings them here. *They may be first considered.*" (pp. 303-304, italics supplied.)

In so ruling the Court referred to *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, which was not a three-judge court case but in which interpretation of the state statute (pp. 177, 178, 191) as well as federal constitutionality was involved and the Court, in disposing of the case on applicability of the statute (pp. 194, 198), said at page 191:

> ". . . that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the cases on local or state questions only. This Court has the same right, and can if it deem it proper, decide the local question only and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. . . ."

and at page 193:

> "The various questions are entirely separate from each other. Under these circumstances there can be no doubt that the . . . Court obtained jurisdiction over the case by virtue of the Federal questions set up in the bill, without reference to the particular violation set up in regard to the Fourteenth Amendment."

See also *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 620, 621; *Michigan Cen. R. R.* v. *Vreeland*, 227 U. S. 59, 63; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 508;

Waggoner Estate v. *Wichita County*, 273 U. S. 113, 116; and *Northwest Laundry* v. *City of Des Moines*, 239 U. S. 486, 491. Thus the rule that federal three-judge courts should decide all issues was established as long ago as 1913 and, as we next show, has not been departed from in any type of reported three-judge court case.

In *Sterling* v. *Constantin*, 287 U. S. 378, the complaint sought to enjoin the governor of Texas from use of the military in civil affairs. It raised questions both of interpretation of the state statutes (that is, their applicability) and their constitutionality. The Court said (pp. 393-394):

> "As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. . . . The jurisdiction of the District Court so constituted, (of three judges) and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case."

Thus it was that the case involved not merely constitutionality but, preliminarily, the interpretation of statutes so far as they might be "deemed to authorize the action" sought to be enjoined. That is precisely the situation in the case at bar. There the question of the authority of the state official defendant was discussed at length (pp. 395 et seq.) although the Court found it possible to "assume, without deciding, that the law of the State authorizes what the Governor has done" (p. 396).

In *Davis* v. *Wallace*, 257 U. S. 478, there were questions both of (a) coverage of the statutes involved and (b) their constitutionality (p. 481). The Court, in deciding the case on the proper interpretation of the statute rather than its constitutionality, said (p. 482):

> "The case made by the bill involved a real and substantial question under the Constitution of the United States. . . . In such a case the jurisdiction of that court, and ours in reviewing its action, extends to every question involved, whether of federal or state law, and enables the court to rest its judgment or decree on the decision of such of the questions as in its opinion effectively dispose of the case."

See to the same effect *R. R. Commission* v. *Pacific Gas Co.*, 302 U. S. 388, 391; *Ohio Tax Cases*, 232 U. S. 576, 586-587; *Lee* v. *Bickell*, 292 U. S. 415, 425; *Query* v. *United States*, 316 U. S. 486, 488-490; *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 115.

In *Public Service Commission of Missouri* v. *Brashear Freight Lines*, 312 U. S. 621, the Court again reiterated the established principle that a special three-judge court, once properly convened in cases seeking injunctive relief from an allegedly unconstitutional statute, has jurisdiction to determine every question involved in the litigation. In that case, it was stated at page 625:

> "A District Court composed of three judges under § 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for injunctive relief, *in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties.*" (Italics supplied.)

Not merely in recognition of the indubitable state of the law on the question here presented, but as a matter of good public policy as well, attorneys for the Department of Justice have in other cases taken the same position. We shall not pause to review, or even cite, the various briefs in which that position is expressed save one. *Colonial Airlines* v. *Adams et al.*, 87 F. Supp. 242, No. 3490-49, was decided by the United States District Court for the District of Columbia, three judges participating, on November 16, 1949. There in the course of the proceedings before the full three-

judge court the Government, in defending public officials there sued, submitted a *Memorandum of Law on Jurisdiction of Three-Judge Court which states* (p. 1):

> "It is settled law that in any proceeding seeking to restrain or enjoin the enforcement, operation or execution of an Act of Congress because of repugnance to the Constitution in which a substantial question as to the constitutionality of such Act is presented, the district court of three judges convened to hear such proceeding pursuant to Sections 2282 and 2284 of the Judicial Code (Title 28, USC) has jurisdiction to consider all issues in such proceeding, whether or not such other issues present constitutional questions. Consequently, unless it should hold that no substantial issue as to the constitutionality of the Civil Aeronautics Act is presented by the complaint, the three-judge court convened in this matter has jurisdiction to hear and decide all the issues presented by the complaint."

That is precisely Appellee's position in the instant case.

It is respectfully submitted that the decisions cited *supra* unequivocably establish that the jurisdiction of the District Court below extended to every question involved in the litigation. Appellants apparently concede that the issue on arbitrary, capricious, oppressive and unlawful action and the issue on constitutionality were properly before the Court, but claim the issue of whether Appellee's labeling was misleading should not have been decided. That latter issue is therefore the subject of the next section herein.

16. Whether Appellee's Pamphlet Violated the Statute was an Issue Properly Decided by the Trial Court

In the instant case, Appellants cite as error the holding of the Three-Judge District Court "that it had jurisdiction to try in a *de novo* proceeding the question whether Appellee's labeling was "misleading in any particular. . . ." (Appellants' Brief p. 26.) This is not a correct statement of the Court's decision. Appellants are in error in speaking

of trying the issue as a "*de novo proceeding.*" "*De Novo*" means to try again. In the instant case that issue was not decided at all by Appellants six *ex parte* decisions or by any other officer or body. Appellants' decisions related to whether the labeling was "in a material respect misleading to the injury or damage of the purchaser or consumer." The Trial Court herein was really considering the question of "misleading in any particular" for the first time, not "*de novo.*"

Appellants contend that the only courts having jurisdiction to inquire into the merits of Appellee's advertising booklets are the various District Courts where the libel seizure papers have been filed, or in a District Court where the numerous libels may be consolidated, the basis for this contention being that Congress did not specifically provide for the determination of such issues in Courts other than where the libels were filed or where libels involving the same alleged misbranding were consolidated. But Congress did *not* specifically take such issues from other courts acquiring jurisdiction of such issues in some other manner. Apparently recognizing that their position is untenable because injunction courts, criminal courts and other types of courts can and must try such issues, Appellants immediately put in a footnote saying "The issue may also be determined, of course, in district courts in which the Government may institute other types of enforcement proceedings" (N. 48, P. 75). The issue can also come up in other types of litigation. Here Appellants themselves on September 22, 1949 sought to take the very issue in the libel cases from the libel courts by filing an injunction action in Los Angeles raising the identical issues before the libel courts. See *supra* p. 17. It is respectfully submitted that this assignment of error is without merit.

The Three-Judge Court below was appointed when Appellee filed a *complaint for injunction* seeking to enjoin multiple libel proceedings on the ground that the so-called

administrative "determinations" or decisions authorizing such multiple seizures were arbitrary, capricious, unreasonable and unlawful and that the multiple seizure provisions of the Food, Drug and Cosmetic Act of 1938 were unconstitutional. Since Appellee's complaint sought to enjoin the enforcement of operation of an Act of Congress for repugnance to the Constitution of the United States, it was mandatory, as explained *supra* pages 118-120, that Appellee's complaint be heard by a District Court composed of three judges. Furthermore, since the suit was against the Appellants in their individual capacities rather than a suit against the United States, it was necessary that the suit be filed in the United States District Court for the District of Columbia in order that personal jurisdiction be obtained over the Appellants. It would not have been possible to bring suit elsewhere.

Ancillary to but inseparable from the two fundamental issues framed below was the question as to whether or not Appellee's advertising pamphlets were in fact misleading as alleged in the various libel actions. It was this issue which actually gives rise to the entire controversy between the parties (R. 757, 770). A decision in it was necessary to dispose of the issues in this case. From the beginning of this litigation Appellants have concentrated on the merits of these pamphlets. Appellants apparently realized from the outset they could not defend by disproving the arbitrary conduct charge—as on that issue their own admissions resolve the issue against them. They have therefore concerned themselves only with wild charges about the pamphlets hoping to gloss over their actions. As has already been pointed out herein, Appellants' brief follows this same procedure.

In order to prove that Appellee had "clean hands" and was entitled to equitable relief, Appellee necessarily had to prove it was not a law violator—or as Judge Goldsborough said, was entitled to prove it is "not a crook,"

(R. 53-54) as "crooks" are not entitled to the aid of equity. That Appellants could continually make their unfounded charges and never have those charges heard and disposed of is unthinkable.

Almost the first words uttered in their defense by Appellants were that Appellee was a criminal and law violator because of the use of these booklets. (R. 575, 580, Argument Jan. 24, 1949 before J. Pine.) Appellants in their briefs in support of their 3 motions to dismiss, their brief here on their Petition for Mandamus and/or Prohibition, their arguments and their evidence made further attacks on the merits of Appellee's labeling. At the argument on the first motion to dismiss Appellants argued "They (Appellee) are not coming into court with clean hands" (R. 580).

Appellee immediately challenged this claim of law violations (R. 582) and unclean hands and in the trial herein as the Court found (Finding 12(f), R. 759-760) completely proved lack of law violations, "clean hands" and its complete good faith. In paragraph 3 of Appellant's Answer to the complaint (R. 749) they claim Nutrilite's labeling conveys the impression that the product is a "cure" even though they knew the direct finding of their own Purchaser survey (R. 39-47) was exactly the opposite. The good faith of Appellee is discussed *supra* pages 44-46.

At the hearing before the Three-Judge Court on the Appellants' motion to dismiss they again charged law violations through use of these booklets (R. 617 *et seq.*) and before this Court at the argument on the Petition for a writ of Prohibition and/or Mandamus Appellants were quick to attempt to besmirch the Appellee as an alleged law violator and insisted upon this Court looking at the 3 pamphlets. They even read excerpts from the pamphlets in their last argument here hoping this Court would think, contrary to the facts, those excerpts and their interpretations thereof were a true picture of the pamphlets. At

every opportunity they have poured forth every choice epithet coined in 43, 35 and 26 (see pp. 18-20 Appellants' brief) years of experience in prosecuting actual law violators in this field and have applied these epithets to Appellee's pamphlets in an attempt to divert attention from their arbitrary, capricious and oppressive conduct herein. All the time Appellants want to talk about the pamphlets but they do not want any Court to inquire into the truth of what they say.

The record herein shows that Appellants based almost their entire case on the unfounded claim, that Appellee was and is a law violator, had unclean hands and was not acting in good faith yet Appellants objected strenuously to the Court's inquiry into these charges. As pointed our *supra* page 30 Appellants really quarrel only with one of the 43 Findings of Fact, i. e., the finding that Appellee's labeling was not misleading. They could not quarrel with the other findings as they offered practically no testimony on anything but the opinions they offered on the labeling. On the labeling issue they offered only the biased opinions of Appellants Dunbar, Crawford, and Larrick who have spent the 43, 35 and 26 years respectively (see pp. 18, 20 of Appellants' brief) prosecuting law breakers. They had made their decisions and were on the stand to defend them to the utmost by using this experience to the utmost. What they said on the stand does not appear in their written decisions so they could say anything bad they could think of—and they used their years of experience to imagine horrible impressions from the words used in Appellee's little pamphlets. It is almost impossible for the fairest minded man in the world to spend so many years prosecuting and not render opinions biased and slanted in that direction. How much more so when Appellants realized their only chance to cover up their arbitrary conduct was to pour on the criticism of Appellee's pamphlets. They had a real incentive

to ignore their survey of the impressions of consumers and purchasers and testify the opposite way.

Appellants objected to the Court's consideration of their charges as they knew that once any Court looked into these questions their unfounded charges would explode in their faces and the full extent of their arbitrary, unreasonable and unlawful conduct would be known. In an effort to hide Appellants' actions behind an immovable curtain they said Appellants "have no interest in" Appellee's "good faith" (R. 48). Also that good faith has nothing to do with the interpretation of the character of Appellee's pamphlets. Conceding for purposes of argument that such may be true in any other Court, in a court of equity good faith certainly is the foundation of Appellee's right to equitable relief.

Appellants would have been quick to move that the Court deny equitable relief if Appellee had failed to prove good faith, clean hands and lack of law violations under such cases as *Precision Co.* v. *Automotive Co.*, 324 U. S. 806, 814 where it is stated that:

> "The guiding doctrine in the case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendants. That doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the *requirements of conscience and good faith.*"

In *Bein* v. *Heath*, 6 How. 228, 247, the Court stated:

> "It is a principle in chancery that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage."

See also *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396, 397.

Also, under Rule 54(c) of the Federal Rules of Civil Procedure the Court was under a duty to grant complete relief. That Rule provides:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The point made by Appellants (p. 25 Brief) about the prayers for relief in the Complaint overlooks this Rule which is obviously designed to make each case dispose of all issues between the parties *properly raised by the evidence*. Also, Appellants overlook the fact that there is a prayer for "such other, further and general and special relief as the nature of the case may require and the Court may deem proper and just in the premises" (R. 737).

It is one of the established maxims of equity that "a court of equity ought to do justice completely and not by halves." To this end courts sitting as courts of conscience have made it their duty to prevent a multiplicity of suits where they have once obtained jurisdiction for any purpose. This established principle was noted clearly in the decision of this Court in *Greene* v. *Louisville & I. R. Co., Supra*, when it was stated at page 520:

> "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. Were we to require a dismissal of these bills as to the state taxes, retaining them as to the local taxes, we should multiply suits, instead of preventing a multiplicity of suits. It is a familiar maxim that 'a court of equity ought to do justice completely and not by halves;' and to this end, having properly acquired jurisdiction of a cause for any purpose, *it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law.*" (Italics supplied.)

In *Camp* v. *Boyd*, 229 U. S. 530, it was stated at pages 551-552:

> "A court of equity ought to do justice completely and not by halves . . .
>
> "One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that would not otherwise be within the range of its authority."

In accord: *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 399. See also: *Smyth* v. *Ames*, 169 U. S. 466, 517-518 "a general decree—would avoid a multiplicity of suits"; *Ex Parte Young*, 209 U. S. 123, 160 stopping harassment by "a multiplicity of suits or litigation generally," and the other cases cited *supra* pages 102-105.

Since the District Court below properly obtained jurisdiction by the existence of a substantial constitutional controversy, it was the duty of the court *to dispose of the entire controversy between the parties.* The controversy between the appellants and the appellee clearly arose from the multiple libel actions which were filed against Appellee's product, alleging that Appellee's advertising booklets were misleading (R. 757, 770). Appellants admit that the various libels involve identical issues of law and fact. The *Greene* case, *supra*, pointedly speaks of the duty of a court of equity to dispose of the "entire controversy *and its incidents.*" (Emphasis supplied.) It could hardly be asserted that the issue as to the misleading character of Appellee's booklet raised in the multiple libel seizure actions was not at least an "incident" in the issues of this controversy between the parties. It is respectfully submitted that the issue of the misleading character of the booklets is more than an incident of the controversy between the

parties and is in fact the basis for the entire controversy so it was properly decided by the Trial Court.

It is respectfully submitted that once having properly obtained jurisdiction, the Court below could determine, in the language of *Camp* v. *Boyd, supra*, at page 551 "rights that would not otherwise be within the range of its authority."

During the course of the proceeding below both parties were given full opportunity to present evidence on the issue of the misleading character of Appellee's advertising booklets. A decision on this question was clearly ancillary to the Constitutional question in this case where the court was considering constitutionality "as applied." Appellants had the full opportunity to present everything it had on this issue and used every stratagem, device and effort to establish its unfounded charges but could produce nothing better than biased opinions as against Appellee's evidence from Appellants' files of actual consumer impressions of the pamphlets. Having lost that issue Appellants now seek to raise the claim that the District Court had no jurisdiction to inquire into the actual merits of its charges. It is respectfully submitted that the District Court sitting as a court of equity had the affirmative duty to end the vexations and interminable litigation which Appellants had so unwarrantedly instituted and to terminate forever the entire controversy on the labeling here involved and that is what it did.

17. The Three-Judge District Court Properly Found That Appellee's Labeling Is Not Misleading

The preceding section has answered some of the arguments made by Appellants in their brief (p. 76 *et seq.*) on the merits of Appellee's labeling. But Appellee desires to consider additional points herein and to note that Appellants in discussing the merits of the labeling have again resorted to the device of lifting sentences and statements

out of context, and misstating the facts which were developed in the proceedings below. It is significant that Appellants at page 84 of their brief state that the booklets "must be read in their entirety." Even Kingsley agreed that "picking of statements at random is an unfair way to attack any writing" (R. 510). Suffice it to say, Appellants, in their own statements, condemn the action of Appellants Crawford and Dunbar in basing their decisions on the labeling without reading it in its entirety. Obviously, Appellants' statement that each of the administrative officials based his decision or decisions "upon his own examination and analysis" of the booklets hardly "squares" with the admitted facts.[101]

Appellants state that the evidence presented by Appellee did not seriously challenge the "medical findings of fact upon which the probable cause determinations were made" (p. 79). The fact of record is that not only did Appellee's evidence seriously challenge those "findings" but Appellants' own evidence seriously discredited them. M. A. Blankenhorn, a witness for Appellants, whom Appellants characterize in their brief as "an outstanding medical expert in the field of nutrition," (pp. 104-105) testified on *direct examination* that "informed medical opinion" could not say yes or no to the finding of Butz regarding the "consensus of medical opinion" (R. 438). One of Butz' findings (R. 1173-1174) recites that vitamins and minerals would not be effective in the treatment of irritability, gastric distress, headache and insomnia, yet Appellants' star medical witness, Blankenhorn could not agree with Butz (R. 435). Furthermore, Appellants put into evidence Butz' deposition which contradicts or repudiates in many instances his so-called "findings of fact" (R. 762, 1175-1215, 392-393). At pages 57-60, 73 we have considered the contents of these

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[101] Findings 17, 30 and 35, R. 761, 765, and 767. See also R. 334, 383, 315, 505, 512-513.

findings attributed to Butz and shown that they cannot be relied upon for any purpose.

Appellants seek to create the impression that the pamphlets hold out that Nutrilite would be effective in the prevention or treatment of such diseases as "heart and coronary diseases, pneumonia, tuberculosis and cancer."[102] Appellee disagrees, and so did the three-judge district Court, with Appellants' so-called interpretation of the labeling. Typical of the perverted justification for their conclusions is their misinterpretation of the reference to "cancer" in the Foreword of the booklets (R. 396, 785, 846, 885). This direct disclaimer Appellants assert is a direct representation that Nutrilite would be efficacious in the treatment of cancer (R. 160-161).[102a] The Court found that the booklets represent to consumers and purchasers no more than that Nutrilite will give to the body an adequate supply of vitamins and minerals so that it will be more healthy (R. 759). The medical testimony below clearly supported this.

On page 82 of their brief Appellants make an attempt to discredit the base of a high concentrate of alfalfa, watercress and parsley contained in Nutrilite by speaking of "quakery" and "nostrums." It is stated in Appellants' brief "they recognized the emphasis of Nutrilite's 'secret base' and its alleged extraordinary merit as characteristic of claims that were prevalent in the heyday of patent medicines and quack nostrums." Then follows reference to R. 316, 334, 400. These references clearly do not support any such statements, not one word being mentioned about Nutrilite's base in the testimony cited. This is typical of Appellants' attempts to mislead this Court. The expert

[102] It should be noted that Dr. Myers testified at considerable length about the relationship of vitamin and mineral deficiencies to sudden cardiac collapse (R. 81, 133-134). Furthermore, the medical testimony below directly recognized the relationship of vitamin and mineral deficiencies to the incidence of tuberculosis (R. 144, 433, 477).

[102a] See pages 42-43 *supra*.

testimony for both parties below recognized that this base contains what has been termed "trace" elements and that the same are essential in human nutrition (R. 163-164, 480, 1199, 1524). Furthermore, it is this unique base which does set Nutrilite apart from all other food supplements (R. 163, 1182, 1199).

Appellants' brief then follows with many quotations from the three booklets which are not only lifted out of context but also eliminate qualifying words and phrases contained in the sentences from which the quotes are lifted. In other instances, Appellants resort to the device of deliberately paraphrasing so that it creates innuendos, implications and inferences not justified by the actual wording of the booklets. Yet at the same time Appellants recognize that the booklets should be read in their entirety and wind up on page 94 with a claim that the pamphlets give "readers a false impression that Nutrilite would prevent or cure all but acute ailments—the very claim which their own Purchaser survey (R. 39-47) had disproved so emphatically when it reported as to customers and purchasers who bought Nutrilite after reading the pamphlet: "None of them thought that Nutrilite was a cure for anything but merely vitamins and minerals which would build their bodies up." Appellants do not mention this finding. All Appellants offer is arguments advanced by biased Appellants trying to justify their decisions against the pamphlets, not evidence as to the impression readers will ordinarily receive. If Appellants had anything to contradict the survey from their files offered by Appellee surely they would have offered it!! *Cf. Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 381.

On pages 91 through 94 of their brief, Appellants list five "material representations" which are "clearly false" and state "such falsity was not contradicted by Appellee." Appellee takes issue with all these charges and Appellee did offer evidence showing the same *not* to be false. Ap-

pellants' first reference in this respect is to the quotation from a New York Times article. Appellants fail, however, to refer to Appellee's Exhibit 22 (R. 1058, 537) which is a copyrighted article on a New York Times dispatch in which is repeated word for word the statement in the booklet attributed to the New York Times. Appellants state that in its context it attributes the high rejection rate for women applying to the WAC to vitamin and mineral deficiencies. No such statement or inference is contained in the booklet, the article merely being put in to illustrate the point that we in the United States are not as healthy as we think we are. Appellants try to draw the same unjustified inference from the statements on page 6 concerning draftees in World War II (R. 235-237, 791, 852, 891).

With regard to the so-called Pennsylvania State Survey mentioned on page 4 of the booklets, the references in the booklet are clearly supported by the survey itself (R. 1225, 456-457)[102b] and also by *Appellants' own Exhibit 18* (R. 1249, 457). The statements by Appellants about Carl Rehnborg are totally unjustified by the record. The stipulation concerning Rehnborg does not in any sense contradict what is said in the booklet. The facts stipulated were not meant and were not considered by the Court as being a complete case history of Rehnborg's education and experience (R. 1542). Appellants wrote this partial outline of his life—it on its face is only a partial outline— and Appellee agreed to it in exchange for withdrawal of a subpoena served on Rehnborg so that he could go home to California under circumstances rebutting any possible inference such as Appellants now seek to draw from it (R. 518-520). By no reasonable interpretation could anyone say what Appellants now say, that such a partial statement of facts covers Rehnborg's whole schooling and experience. A fair

[102b] The "survey" (R. 1225-1247) which was offered by Appellants clearly recognized the widespread incidence of vitamin and mineral deficiencies. See particularly R. 1226-1231, 1243-1244.

reading of both will show that the facts in the stipulation do not contradict those in the pamphlet in any respect. (See R. 239-241.)

Appellants' reference to page 28 of the booklets (R. 913) clearly aborts and misstates the language of the booklet. The booklet does not state that deficiency diseases are those most responsible for death but only that "diet deficiencies may . . . . show itself as one of the common or not so common deficiency diseases, including those most responsible for death in our 40's and 50's." The references obviously are to deficiency diseases causing death in the 40's and 50's and not to other diseases.

It is interesting to note that in making all these most strained arguments never *once* do Appellants seek to find in the pamphlets the things they attribute to Butz in the findings they never did prove he signed.

Finally, on page 83 Appellants refer, as they do in most of the references they make to the 58 page pamphlet and say "the administrative officials" were entitled on the basis of things Appellants refer to in the 58 page pamphlet to conclude that the case histories which appear only in that pamphlet represent certain conclusions. Appellants neglect to say that the *only* administrative official having the 58 page pamphlet before him was Appellant Crawford who admittedly did not read it when he condemned it as misleading (R. 761), nor do Appellants refer to the fact that use of the 58 page pamphlet was discontinued *October 11, 1948*—a long time ago—as soon as it was questioned in the first libel seizure in Belleville, New Jersey (R. 161, 762-763). Nor do Appellants claim the references to the 58 page pamphlet are representations that Nutrilite will cure anything for they know the pamphlet says of the ailments there described "Nutrilite did not cure the ailment" (R. 825) and in other places it specifically says Nutrilite is *not* a cure (R. 785, 825, 837, 840-841). Also the pamphlet qualifies the case histories time and time again as for example:

"It should also be remembered that the cases described above were selected to show what happens where there is an *extreme* (underlined in original) nutritional deficiency . . ." (R. 837). Also, "In preparing this book for your reading, our primary purpose is to cause you to realize that the average or better than average civilized diet does not provide you with complete and adequate nourishment" (R. 840).[103] But we do not want to be guilty of lifting sentences out of context as Appellants are. Appellants know that purchasers and consumers who read the entire pamphlets gain no misleading impressions as that was the result of their purchaser survey cited above and that was the result when each of the three judges read the entire contents of each pamphlet (R. 182, 294). They just hope that by bringing this tremendous record here this Court will *not* have the time to read the pamphlets and will take their excerpts lifted out of context as a true picture of the pamphlets' contents.

Appellants know better than anyone else that if this Court reads the three pamphlets in their entirety Appellants' unfair twisting of their true meaning and intent will be rejected. If Appellants could have found one consumer to

[103] The case of *United States* v. *John J. Fulton Co.*, 33 F. (2d) 506 does not hold, as Judge Goldsborough points out at page 150 of the Record that where, as here, the case histories are preceded, surrounded, and followed by explanatory material they represent a product as a "cure." That purchasers and consumers did not understand these as such a representation, see *supra* pages 28-30, as it was the 58-page pamphlet they read. Appellants do not question that the case histories are authentic (R.380). The sworn affidavits of each person giving such a history were furnished to Appellants (R. 520). *Cf. Northam Warren Corp.* v. *Federal Trade Commission*, 59 F. (2d) 196 (CCA 2d). The Court did not stop cross-examination on this as Appellants claim (p. 84, Brief) but specifically told Appellant's Counsel "You can continue in it if you think there is any profit in it for you" (R. 152). The case histories in this pamphlet relate to good faith only as their use was discontinued immediately (18 months ago) when questioned and Appellants were so notified (R. 762-763). That action proves Appellee's good faith. See *supra* pp. 44-46.

back up their claims one can be sure he would have been presented as a witness at the trial, for as stated page 39 *supra* they surely spent enough time and money interrogating Appellee's customers hunting for that one, yet-to-be found customer or purchaser witness.

18. The Legislative History of the Act Does Not Sustain Appellants' Conventions—It Indicates a Contrary View

(a) Judicial Review of Arbitrary, Capricious and Oppressive Conduct not Intended to be Eliminated

Appellants argue (P. 58, brief) that the legislative history of the Federal Food, Drug and Cosmetic Act reveals a Congressional intent to eliminate judicial review of the administrative decisions required as a condition precedent to the institution of multiple seizures under the Act.

In support of this argument, Appellants cite the language of several of the earlier bills which were before Congress and which contained specific authority for executive seizures of certain defined articles and which also authorized "suits of the kind here involved." (P. 53, Brief). Appellants then cite the provisions of later bills and of the Act as enacted and because such bills and Act did not contain the specific provision authorizing courts to enjoin multiple seizures, Appellants conclude that Congress irrevocably and finally "rejected" their right to do so.

Appellants correctly state that S. 5 of the 74th Congress [104] was passed by the Senate in May, 1935, containing the following language in Section 702:

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[104] Complete examination of the legislative history of the Federal Food, Drug and Cosmetic Act requires a study of the legislative progress of the following five bills, the last named of which, was enacted:

(1) S. 1944, 73rd Congress, 1st & 2d Sessions.
(2) S. 2000, 73rd Congress, 2d Session.
(3) S. 2800, 73rd Congress, 2d Session.
(4) S. 5, 74th Congress, 1st & 2d Sessions.
(5) S. 5, 75th Congress, 1st & 3rd Sessions.

"The District Courts of the United States are hereby vested with jurisdiction, on petition by any interested person . . . to grant appropriate injunctive relief from any act or omission of any officer, representative, or employee of the Department in the administration of this Act, if it has been shown that such act or omission is unreasonable, arbitrary, or capricious, in the light of the facts, or not in accordance with law, and that the petitioner may suffer substantial damage thereby . . ."[10]

And that this language was eliminated by the House Committee.

But Appellants fail to specify or account for the reason why this provision was omitted from later drafts of the bills and from the Act as enacted. Appellee asserts that there is an adequate and satisfactory explanation for the omission of this provision granting district courts jurisdiction to restrain the institution of multiple seizures and that this explanation is clearly revealed in the language of a report of the House Committee on Interstate and Foreign Commerce which, in reporting S. 5 of the 74th Congress to the House, eliminated the above quoted portion of Section 702 with the statement that a specific provision in the Act giving Courts jurisdiction to enjoin arbitrary, capricious and oppressive action was unnecessary because courts of equity and courts empowered to render declaratory judgments could protect against such action anyway. Appellants note the "elimination" but skip the report explaining why.

[10] See Senate Report No. 361, 74th Congress, 1st Session, where, with reference to this language, it was stated:

"This section likewise authorizes the courts to grant appropriate injunctive relief from any act or omission on the part of the Department or its officers, representatives, or employees in the administration of the act. The established rules of constitutional law governing judicial review of administrative action, as developed by the United States Supreme Court, would, of course, be applicable to proceedings under this section."

The Committee Report states:[106]

"The committee had several reasons for the omission of this section of the Senate bill. This section would have given to the district courts jurisdiction to restrain by injunction the enforcement of regulations, or to grant appropriate injunctive relief from any act or omission of the Secretary or his officers or employees, upon a showing that the regulation or the act or omission was unreasonable, arbitrary, or capricious, or not in accordance with the facts or law, and that the petitioner might suffer substantial damage by reason of the enforcement of the regulation or by reason of the act or omission. The committee was not aware of any precedent for such a provision. Insofar as it gave the court jurisdiction to decide whether the regulation, act, or omission was not in accordance with the facts, it was felt that this would constitute the imposition of a nonjudicial function upon the court. (See Federal Radio Commission v. General Electric Co., 281 U. S. 464.)[107] Aside from this consideration the court would have been authorized to grant the relief if the petitioner could show that he 'may suffer substantial damage.' This seemed to the committee to be a radical departure from the ordinary principles of equity under which relief may be granted where there is no adequate remedy at law and the complaining person can show that he will suffer irreparable injury.

"The committee felt that there was no reason to add to the existing remedies which are applicable in the case of administrative action under the many other acts passed by Congress. There is always an appro-

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[106] House Report 2755, 74th Congress, 2d Session. See DUNN, FEDERAL FOOD DRUG AND COSMETIC ACT (1938) 556-557.

[107] Cf. *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249, 262; *Federal Radio Comm.* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 275; That the Federal Communications statute now restricts review to judicial questions see *Federal Communications* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144. The requirement that the decision herein be based on "facts found" and the admitted absence of all facts is discussed *supra* page 51.

priate remedy in equity in cases where an administrative officer has exceeded his authority and there is no adequate remedy of law, and furthermore the committee is of the opinion that ample protection is given by the so-called Declaratory Judgments Act enacted on June 14, 1934, as section 274D of the Judicial Code (U.S.C., 1934 Ed., Title 28, Sec. 400). Insofar as the court would, under the Senate bill, have been empowered to give relief in case a regulation or an act of the Secretary was unreasonable, arbitrary, or capricious, or not in accordance with law, this is merely the ordinary principle which the court applies in cases where an administrative official has exceeded his authority, and a person affected by an administrative official's action may always, whether in a criminal proceeding, equity proceeding, or any other proceeding, raise these issues. The provision of the Judicial Code above referred to gives the courts jurisdiction in actual controversies to declare rights and other legal relations of any interested party, and such a declaration has the force and effect of a final judgment or decree and is reviewable as such. This provision of the Judicial Code would apply to all kinds of disputes arising between parties or arising under legislation, but as stated in the report of the Judiciary Committee when it reported out the measure, 'This form of preventive relief is distinguishable from curative relief in that the latter is incapable of redress until an injury has occurred or the contract broken.' The remedy furnished seems to be peculiarly adapted to cases where the interests and rights of parties are affected by the acts of administrative officials. . . . " (Underlining supplied.)

This, it is respectfully submitted, is the true reason why the Section was omitted and cannot, under any circumstances, be deemed to support Appellants' suggestion that Congress "rejected" the jurisdiction to enjoin the making of multiple seizures by arbitrary, capricious and oppressive action. Precisely the opposite is the case for the above in-

dicates a belief that it was unnecessary to spell out review provisions in the Act.[198]

(b) Words "Without Hearing" Slipped Into Bill in Last Conference Just Before Final Adoption and Probably Unknown to Most Members of Congress

Attention should be directed to the footnoted statement in Appellants' brief (P. 57-58, n. 35) as to statements made

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[198] While not directly reflecting Congressional intent, the following statement, made by the then Chief of the Food and Drug Administration before a subcommittee of the Senate Commerce Committee which was conducting the initial hearings on S. 1944 of the 73rd Congress, the first of the bills which Congress was to consider is of interest. This statement followed a colloquy that pertained to the establishment of tolerances by the Secretary of Agriculture, and read as follows:

"Senator Copeland: Then it would not be merely an arbitrary establishment on the part of the Bureau of the degree of the tolerance?

"Mr. Campbell: Indeed no. Furthermore, the growers and others commercially interested would be heard.

"Senator Copeland: It would be done by scientific study and research?

"Mr. Campbell: Quite right, and I would like to say, that if there were to be an arbitrary determination which was capricious, quite naturally it could be overturned by an appeal to the court.

"Senator Copeland: Is such provision made in the bill? Is it clearly stated in the bill that there would be a possibility of such an appeal?

"Mr. Campbell: *That has not been definitely stated. That is not necessary.* Such a court review can always be had, Senator. There is no question whatever but that *the courts have the right to review every section of this law* and every regulation promulgated by the Secretary under the law. It is expected that that will be done; and if the action of the administrative agency has been found to be arbitrary, unreasonable, capricious, and not predicated upon evidence and upon facts, there is no question but what the courts will not sustain it. . . ." (Italics supplied.) Hearings Dec. 7, 8, 1933, p. 20.

This bill authorized multiple seizures. See *supra* pages 109-110 judicial review.

by Judge Clark in the trial below where he agreed with Appellee's Counsel that the words "without hearing" were "slipped" into the Federal Food, Drug and Cosmetic Act by the Conference Committee without their presence being known to most members of Congress (R. 679-680).[109] Appellants' themselves refer to these words as having been "inserted" by the Conference Report without explanation "presumably because its meaning and purpose were obvious" (p. 58). Appellee is quite well aware that this Court has only recently had occasion to reject a contention that the Congress knew not what it did and the foregoing is set forth with some little hesitation because of that fact. *Ex Parte Collett*, 337 U. S. 55, 72.

The Food, Drug and Cosmetic Act of 1938 was adopted after five years of Congressional consideration to replace the Food and Drugs Act of 1906. Senator Copeland introduced the original bill on June 12, 1933 (S. 1944, 73rd Cong. 1st Sess.). Of this Bill he later said:

> "I introduced it in June but did not read it until October . . . When I read the Bill I was shocked to think I had introduced a bill like that, giving arbitrary power to the Secretary of Agriculture."[110]

From 1933 to June, 1938 there were many varying bills introduced, many revisions and amendments were accepted or rejected, many committee and subcommittee hearings conducted, and many debates took place in the Senate and House of Representatives. This legislative history has been

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[109] R. 679-680: "What Mr. Rhyne stated the other day over in Court is perfectly correct, that this language that you rely on in that statute was slipped in there. . . . I did (not) happen to be a member of the Conferees, and I was negligent, I freely admit, that I did not notice it in the Conference report. It was slipped in the Conference report and never intended to be there, neither in the Senate nor the House."

[110] 79 Cong. Record 5024.

considered in detail by this Court in other cases so is not repeated herein.[111]

Notwithstanding intensive consideration of the various drafts of the bills during this 5-year period, not a single draft contained the words which are used chiefly as a cloak for the actions of Appellants herein, i.e., "without hearing" or the phrase in a material respect misleading "to the injury or damage of the purchaser or consumer." There is not the slightest suggestion in the legislative history of this Act that such words were discussed prior to the report of the Conference Committee which reported the final draft of the Act.

The dates upon which the conferees were appointed, upon which the Conference Committee agreed on the final language, upon which their report was submitted, and upon which it was accepted are most revealing. On June 2 and 3, 1938, the Senate and House conferees, respectively, were appointed.[112] On June 10, 1938, the conferees agreed upon the manner in which the differences would be settled. On that same day the Senate adopted the Conference report.[113] It is reasonably certain many of the Senators, except possibly those on the Conference Committee, did not know of the existence of the new words "without hearing" in the bill as they probably did not see the text of the bill until it came out the next day in the Congressional Record as inserted (without reading it) by Senator Copeland at the time he asked for the vote approving it. On June 11, 1938, the Conference Report was submitted to the House of Representatives and on June 13, 1938, it was there accepted without any specific debate of the words "without hearing" and in a material respect misleading "to the injury or damage of the purchaser or consumer" which would have made

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[111] *United States* v. *Dotterweich*, 320 U. S. 277, 282.

[112] 83 Cong. Rec. 7955, 8169.

[113] 83 Cong. Rec. 8731.

their presence in this long and complicated Bill certain to be known to the members of that body."[114]

Thus for the first and only time, so far as Appellee's research extends, the words "without hearing" were written into a Federal statute—and with no explanation anywhere of any reason for this insertion.

It should also be observed in connection with the appearance of these words in the report of the Conference Committee that neither the Senate nor the House versions of the measure which were passed by the 75th Congress and sent to Conference, or for that matter neither the versions which were before any of the previous Congresses, contained any language which remotely approached that which appeared in the Conference report for the first time. The legislative history reveals that the major debates did not take place on the Conference report of the 75th Congress—they took place upon the other Bills introduced in the respective houses of Congress, and which, as noted above, were silent as to this phraseology.

Perhaps of equal significance with this apparent afterthought of inserting the words quoted above is the fact that when the Conference Committee's report was presented to the Congress, not the slightest effort was made by the sponsors of the bill, or the conferees themselves, to explain their inclusion to the members of the two houses either in the report or on the floor of Congress and both houses speedily accepted the report.

It cannot be said with accuracy, therefore, that Congress had lent the same painstaking and careful deliberation to the inclusion of the words "without hearing" and the phrase in a material respect misleading "to the injury or damage of the purchaser or consumer" in setting up the statutory scheme as it had to the various other aspects of the Act. Such a contention is completely rejected by the significant silence of the legislative history of the Act re-

[114] 83 Cong. Rec. 9087, 9095-9101.

specting this particular verbiage, and the circumstances which surrounded its adoption.

We have the greatest respect for the able men who make up the Congress and find it hard to believe that they intended the result revealed by Appellants' actions herein. In view of the known fact that Federal agencies have an opportunity to influence drafts in conference, it seems reasonable to conclude that the words were inserted in a belief that it would be easier to administer the Act with the words "without hearing" inserted. Surely constitutional guarantees are not to be "compromised on the footing of convenience or necessity." *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 305.

19. "Nor Will We Go Upon Him, Nor Will We Send Upon Him, Unless . . . By the Law of the Land"

For more than 700 years the words quoted in the title have stood as a part of the cornerstone of the common law heritage guaranteeing free people against abuse by government officials. They come from the Magna Charta which was wrested in 1215 by a rebellious people from the tyrant King John as a bulwark against arbitrary, capricious and oppressive government. The full text bears repeating and is as follows:

> "No free man shall be taken, or imprisoned or disseized or outlawed, or exiled or in any wise destroyed; nor will we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." [114a]

Down through the years many English kings have been forced to declare their adherence to the language of this Chapter of King John's "Charter of Liberties." [115]

[114a] 17 John. 1215 C 39. Translation by Bishop Stubbs, 1 Constitutional History of England, 577.

[115] McIlwain, *Due Process of Law in Magna Charta*, (1914), 14 Col. L. Rev. 27.

It seems appropriate here where Appellants have certainly *gone upon* Appellee and have *sent upon* Appellee that we recall some of the milestones of the development of due process of law as contained in the Bill of Rights to the Federal Constitution. This brief resort to history seems most appropriate as a prelude to the inquiry whether our Constitution permits Government officials like Appellants to "go upon" and "send upon" our people in the way Appellants have gone upon and sent upon Appellee under the facts herein.

Only a few highlights can be referred to without extensive recitation. Going directly to 1610 and *Dr. Bonham's* case, 8 Coke 107(a), one finds that great jurist holding that actions of the Parliament against "human right and reason" are void.[116] Later one finds the creation of the "Star Chamber" which exercised arbitrary power authorizing shocking oppression of the people in the name of the King. In 1629 came the Petition of Right under Charles I, and in 1641 the infamous Star Chamber was abolished.[117] In 1688-1689 the English Declaration and Bill of Rights were released. In 1690 John Locke published his *Second Treatise on Civil Government* denouncing "arbitrary power" and "arbitrary decrees" by government. This book was widely read by our forefathers and his ideas played a prominent part in the formulation of our Constitutional principles.

In 1775 our great Declaration of Independence denounced 21 separate acts of arbitrary government in no uncertain terms. In 1789 our Federal Constitution went into effect

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[116] See also *Baggs* case, 11 Coke 93(b) 99(a) (1616) holding a decision depriving an alderman of the freedom of the city void under *Magna Charta* where ". . . they have proceeded against him without hearing his answer to what was objected, or that he was reasonably warned . . . such removal is against justice and right."

[117] See Plucknett, *A Concise History of the Common Law* (2d ed. 1936).

only after a definite promise was given that immediate action would be taken to guarantee our people against abusive governmental action. Distrust of excesses of governmental action were the direct cause of this promise, and without it the Constitution may not have been ratified.[118] In the First Congress Madison proposed the first 10 amendments containing our Bill of Rights and in 1791 these amendments were adopted and became effective to put into definite language this guarantee against arbitrary, capricious and oppressive action by government.

From the time of the adoption of the Constitution up until the adoption of the 14th Amendment in 1868 the due process clause of the Fifth Amendment was invoked infrequently by the courts.[119] In this Court one finds a few cases like *Bank* v. *Okely*, 4 Wheat. 235, in 1819 announcing (p. 244):

> ". . . the good sense of mankind has at length settled down to this: that (the words) 'due process of law' were intended to secure the individual from the arbitrary exercise of the powers of Government . . ."

Shortly after the 14th Amendment went into effect a veritable flood of litigation seeking to invalidate governmental action as a violation of due process of law began to reach the courts. Only a few landmarks will be cited: in 1872 in the *Slaughter House* cases *(Davidson* v. *New Orleans)* 96 U. S. 97, Bradley, J., in concurring said if gov-

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[118] Brannon, *The Fourteenth Amendment* (1901); McGehee, *Due Process of Law Under the Constitution* (1906); Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911), 24 Harv. L. Rev. 366 and 460; Corwin, *The Supreme Court and the Fourteenth Amendment* (1909), 7 Mich. L. Rev. 643.

[119] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636-637: "Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government."

ernmental action is ". . . found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law' " page 107; in 1884 *Hurtado* v. *California*, 110 U. S. 516 (use of information instead of indictment). In the *Hurtado* case the Court said in part at page 531:

> "The concessions of Magna Charta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. 'It did not' enter the minds of the barons to provide security against their own body . . . by limiting the power of parliament. . . . Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation."

Down through the years there has been the use of the due process clause to protect substantive rights by inquiring into the reasonableness of legislative action under the "means and the end" and "real and substantial" relationship tests as applied to particular businesses, with the pendulum swinging first one way then the other.[120] *The cardinal principles guaranteeing fair treatment contained in procedural due process have, however, stood immutable.* It seems to be a fair interpretation of the more recent decisions of this Court that the emphasis is now upon procedural due process for "injustices flourish where procedural requirements are relaxed."[121] The instant case is certainly one of procedural due process.

The emphasis on procedural due process has carried over to the legislative branch of our National Government with the enactment of the Administrative Procedure Act in 1946 designed to guarantee that Governmental agencies treat

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[120] Brown, *Due Process of Law, Police Power and the Supreme Court* (1927), 40 Harv. L. Rev. 943; Warren, *The Progressiveness of the United States Supreme Court* (1913), 13 Col. L. Rev. 294; Warren, *The New Liberty Under the Fourteenth Amendment* (1926), 39 Harv. L. Rev. 431 *cf. Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220.

[121] Mr. Justice Douglas, *Procedural Safeguards in the Bill of Rights* (1948), 31 Am. Jud. Soc. J. 166-168.

our people fairly. This Court's recent decision giving a broad interpretation to that Act has certainly advised the administrative agencies that this Court will give full support to the Congressional intent. *Wong Yang Sung* v. *McGrath, supra.*

The whole world is now torn in a struggle over the principles underlying freedom of man and governmental control over man in his life, liberty and property. The latest bulwark in this development is the Human Rights Covenant where the word "arbitrarily" is used as a brake on governmental action since the term "due process of law" is not a term understood as a part of the law in other legal systems. Unfortunately the Covenant as presently proposed protects only life and liberty and omits "property"—the latter out of deference to the Soviet Government.

It is believed that Appellants' arbitrary, capricious and oppressive conduct in the instant case have offended the fundamental principles of justice thus deeply rooted in the traditions and conscience of our people. If the statutory provisions here involved are construed as authorizing such conduct it is respectfully submitted that it violates that fundamental fairness of treatment guaranteed by the due process clause.

20. In Absence of Emergency of Compelling Public Necessity Requiring Immediate Action, no Person may be Irremediably Deprived of His Property by Governmental Action Without a Hearing, If What Appellants Did is Authorized by the Statutory Words They Violate Due Process

Appellants in their brief (pp. 35-45) attempt to ascribe to the ruling of the lower court a basis which is completely unwarranted. This tactic is understandable inasmuch as they find the true basis of the ruling unassailable, a conclusion which is justified by their failure to refer to it in a single instance.

The basis of the lower court's ruling on the constitutional

issue is that where governmental action, by whatever name it is called, leads to irreparable injury, there should be an opportunity to be heard in advance of injury except where a great public necessity requires immediate action. It is this principle—as applied to the facts of this particular case—which this Honorable Court is now asked to reaffirm.

Appellants in their brief assume that Appellee's complaint is limited to the words "without hearing" rather than embracing all the conduct of Appellants herein, and then (p. 37) seek to further confuse the constitutional issue by *omitting* the first line of the Trial Court's Conclusions of Law, i. e., "The Court, upon the basis of the Findings of Fact herein, makes Conclusions of Law as follows: . . ." The conclusion that the provisions of Section 304(a) under which Appellants claim they acted is unconstitutional as in violation of the due process clause is based upon these Findings of Fact. And the position of the Trial Court simply stated is that when the words here involved are construed as authorizing what Appellants have done arbitrarily, capriciously and oppressively as set forth in the Findings of Fact herein, those words violate the due process clause.

Finding of Fact 42 of the Trial Court, *to which Appellants do not take exception in any way,* is as follows: (R. 770);

> "There was and is no emergency involving injury or damage of any kind to the public or to any purchaser, consumer or user of Nutrilite or in connection with Nutrilite and plaintiff's use of the three pamphlets which constitute defendants' sole objection to Nutrilite's sale. Defendants have not, at any time, indicated or contended that there is an emergency or situation of compelling public necessity with respect to the labeling of plaintiff's product and no such emergency or situation did, in fact, exist at or prior to any of the actions of defendants described herein."

The principle of law stated in the heading of this section is firmly established by the decisions of this Court and has been summarized as follows:

> "Where immediate action is necessary in the public interest, it is obvious that the parties cannot be heard before action is taken. When immediate action is not necessary, a hearing before action should clearly not be necessary where the action itself leads to no irreparable injury but leaves a later remedy which adequately protects all the rights of the parties. Where the initial action will itself lead to irreparable injury, there should be an opportunity to be heard in advance of action except where a great public interest requires immediate action. Otherwise, the remedy is not unlike that of a new trial in a capital case after the execution of the accused."

Dodd, Cases on Constitutional Law (1941), 894. Thus the manifest purpose of requiring a hearing "is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, 182.

No special exigencies exist here which require that Appellants be denied their constitutional right to a hearing before irreparable injury is inflicted by invoking the statutory *exception* under which multiple seizures were authorized by Appellants. There was and is no emergency or situation of compelling public necessity making it impossible to take the time to give Appellee a fair opportunity to present its facts to the Administrator before his decisions that the ruinous onslaught of multiple seizures is to be authorized.

Absence of any facts justifying Appellants' actions herein is most significant. For as this Court said in *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 548,

> ". . . experience demonstrates that particularly in constitutional cases, issues turn upon factual presentation."

Absence of justifying facts have been found fatal to interference with freedom of speech under a guarantee of equal status to that here invoked. *Bridges* v. *California*, 314

U. S. 252, 260-263.[121a] The facts herein have been fully considered *supra* pages 8-93 and are carefully set forth in the Findings of the Trial Court (R. 756-770) so they will not be restated here. The failure to read before decision, absence of facts on injury or damage and other facts which govern this constitutional question, have all been discussed herein and that discussion will not be repeated here. See *supra* pages 46-62.

The absence of any emergency is no more clearly and positively revealed than by the record of Appellants' own conduct in this case. Seizures were made in *seven* states only, in the period from October 6, 1948, until Appellants were restrained in this action, although Appellants had the names of Appellee's distributors and could have seized the product in 5,000 different places (R. 769-770). During that period the *alleged* "danger" to the public health went completely unabated in forty-one states. Moreover, even in those districts where the product was seized, other shipments were allowed to pass into the hands of purchasers before and after each seizure. Yes, Appellants were getting ready to make more seizures (R. 412, 769-777) to keep up the "pressure" on Appellee (R. 766-767) but such planned seizures were not for the purpose of protecting the public from any danger as the pressure memorandum does not mention any danger as its motivating purpose (R. 67).

In all cases involving summary seizure of property by or under the direction of governmental officials the courts have held such action a violation of due process in the absence of an emergency of compelling public interest requiring immediate action. Illustrative of this rule among state

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[121a] If ever it is held, as Appellants seem to contend, that only the Appellants can interpret labeling and their opinions must be accepted as against the impressions of purchasers and consumers, see *supra* pages 28-30, we will have government imposed thought control which will lead to unlimited and uncontrolled censorship of free speech and press.

court decisions are: *Jenks* v. *Stump*, 41 Colo. 281, 93 P. 17; *Rowland* v. *State*, 129 Fla. 662, 176 So. 545; *Lacey* v. *Lemmons*, 22 N. M. 54, 159 P. 949; and *People* v. *Broad*, 216 Cal. 1, 12 P. (2d) 941.[122] In *Jenks* v. *Stump*, *supra*, at page 20 the Court said:

> "The distinction in all such cases seems to be whether public necessity demands summary action and, when it does not, notice must be given to the owner of the property and an opportunity be given to determine the truth of the allegations in each case, before the same is taken. . . . It does not appear from the record that any public necessity existed, nor that the public safety was in any manner conserved by taking these animals from the range or that any exigency existed which required them to be taken without notice to the owner and a hearing to determine whether or not they were abandoned or neglected, *nor does the statute purport to restrict the powers granted to cases of emergency.*" (Italics supplied.)[123]

In *Rowland* v. *State*, *supra* at page 547, the Court said:

> "We recognize the fact that the police power is a very broad one and that its exercise is necessary for the welfare of the community, but the right to exercise police power does not carry with it the unqualified right to destroy private property without due process of law. In emergencies such as those which are often caused by conflagrations, floods, windstorms, etc., it

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[122] Similar decisions are: *Randall* v. *Patch*, 118 Me. 303, 108 A. 97; *Carter* v. *Colby*, 71 N. H. 230, 51 A. 904; *City of Paducah* v. *Hook Amusement Co.*, 257 Ky. 19, 77 S. W. (2d) 383; *Loesch* v. *Koehler*, 144 Ind. 278, 41 N. E. 326; *McConnell* v. *McKillip*, 71 Neb. 712, 99 N. W. 505; *People* v. *Marquis*, 291 Ill. 121, 125 N. E. 757; *Stockton* v. *Morris*, 172 Tenn. 197, 110 S. W. (2d) 480; *Shepard* v. *Giebel*, 110 S. W. (2d) 166 (Tex.); *Edson* v. *Crangle*, 62 Ohio St. 49, 56 N. E. 647.

[123] See *Missouri Pacific R. R. Co.* v. *Nebraska*, 217 U. S. 196, 207-208, invalidating a statute which had "no reference to special circumstances. It is universal in terms."

may become lawful to destroy private property without notice and without hearing for the protection of the public, and in such cases the right of the individual will yield to the right and for the benefit of the public at large, but in the normal and orderly course of events this necessity does not arise, and the rights of the citizen to the acquisition and enjoyment of property must be respected at least to the extent of giving him the right to be heard before his property is taken without compensation and without a hearing before some tribunal authorized to determine the necessity thereof."

In *People* v. *Broad*, *supra* at page 943, the Court said:

"The rule is well settled that to constitute due process of law in regard to the taking of property the statute *should give the parties interested some adequate remedy for the vindication of their rights;* and while it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action—instances of this being the power to destroy diseased meat or decayed fruit, to kill diseased cattle, or to destroy property kept in violation of law which is incapable of lawful use—nevertheless, where the property involved is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded an opportunity to be heard." (Italics supplied.)

In the instant case where *no* emergency or situation of compelling necessity exists or has ever existed [124] and where no facts whatever revealing complaints, injury [125] or damage are known to Appellants (with the only facts in Appellants' files to the exact contrary), [126] a situation of compel-

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[124] *Cf.* the dissent of Mr. Justice Holmes concurred in by Mr. Justice Brandeis in *Leach* v. *Carlile*, 258 U. S. 138, 140.

[125] Findings 17, 29, 30, 35, R. 761, 765, 767.

[126] *Supra* page 28.

ling public interest necessitating immediate action before hearing is *not* shown. The claim that the Appellants' action must be accepted as conclusive proof of its own necessity, and must be accepted as in itself due process of law, has no support in the decisions of this Court. *Sterling* v. *Constantin*, 287 U. S. 378, 400.

It is Appellee's position that under the shocking facts of this case due process of law was not accorded to it and if it is found that the unusual provision herein attacked really authorized Appellants to do what they have done, Appellee submits that there is no other possible conclusion than that these few quoted statutory words *as applied to Appellee under the facts in this case*, violate the due process required by the Fifth Amendment for the taking of property by governmental action.

The constitutionality of this unusual use of multiple seizures has never been before this Court. The only Appellate Court to consider this type of action held that multiple seizures under much milder facts violated due process of law requirements. *National Remedy Co.* v. *Hyde*, 50 Fed. (2d) 1066 (D. C. App.).

These cases certainly adhere to the fundamental premise that in the absence of an emergency, a hearing before harm is essential to due process.

Appellants say (p. 38) their decisions are "merely the prerequisite to the bringing of a lawsuit." That statement is erroneous because they can bring one "lawsuit" without any such decision. It is only when they want to make multiple seizures after the *first* lawsuit that the decision is required. Appellants say that their seizures are via court process so are not summary in character. Such an argument substitutes fiction for fact. We ask the Court to pierce the veil of such fiction, as it has in so many other instances, and protect us from these seizures which are in fact summary. The cases are filed and seizure immediately takes place—the courts where the papers are filed make no

preliminary investigation to determine whether the suits are justified—5,000 suits could be filed in one day and no court on its own motion would do anything to stop them.

All of Appellants' argument about the decisions being mere recommendations (p. 47) is also an attempt to substitute fiction for fact. The Record shows they send the libel papers directly to the United States District Attorneys with a letter saying, "immediate seizure is requested" (R. 273, 413). The District Attorney does not have to write up anything, just file the papers and the seizure takes place as requested, "immediately." Judicial process is summary process under these circumstances where Appellants use such judicial process *ex parte* to punish us knowing full well only one of the many cases will be tried. In his dissenting opinion in *Springer* v. *Philippine Islands*, 277 U. S. 189, 211, Mr. Justice Holmes said "legislative and executive action" cannot be distinguished "with mathematical precision and divide the branches into watertight compartments." The same rule applies here. Appellee is protected under the Fifth Amendment from the unfair (and they say unstoppable) use of court process made here by Appellants. Appellants grand jury analogy is equally inapplicable, see *supra* page 74.

Appellants rely upon *Bowles* v. *Willingham*, 321 U. S. 503, where regulations and orders fixing rents were upheld although the statute provided that the rents were to go into effect at once and a hearing was to be given later. The Court stated at page 521 that this was "all that due process under the war emergency requires."

In the case of *Yakus* v. *United States*, 321 U. S. 414, also relied upon by Appellants, the Court in upholding emergency price controls and the denial of interlocutory relief pending a final decision on validity of the statute and regulations adopted thereunder said (P. 442):

> "our decisions leave no doubt that when justified by compelling public interest the legislature may author-

ize summary action subject to later judicial review of its validity . . ."

In both cases the Court *stresses the war emergency and compelling public interest again and again* a. he statutory requirements of expeditious handling of protests with specified time limits and a special emergency court doing nothing else but considering appeals. In the *Bowles* case at page 520 the Court said:

> ". . . Congress was dealing with the exigencies of wartime conditions and insistent demands of inflation control."

Also, in those cases the injury was really small (cf. *Lawton* v. *Steele*, 152 U. S. 133, 141) and had no lasting effects as compared with the stigmatizing publicity actions of Appellants on Appellee herein. In those cases no one person was singled out for "special" punishment in the way Appellee was in the instant case. A national war emergency affecting the whole Nation was involved. This is not true in the instant case as a narrow issue based on unique facts is involved.

Appellants cite *Phillips* v. *Commissioner*, 283 U. S. 589, as supporting non-emergency summary action by Government. In that case the particular taxpayers had a remedy which would give them a hearing before their property was taken and Mr. Justice Brandeis pointed out "this remedy may be had before payment, without giving bond" and that even on appeal "assessment and collection meanwhile may be stayed by giving bond to secure payment." Is it any wonder that the Court held (p. 599):

> "These provisions amply protect the transferee against improper administrative action."

Also, summary power to collect monies and taxes due to Government is one of the oldest rights of all governments —essential to their existence—and never thought to be

within due process proscriptions. *Cf. Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272. In the instant case there is no way Appellee can give bond to stop the multiple seizures and Appellee's property is taken immediately as no District Court has authority to refuse the use of its process to Appellants in making the seizures. The *Phillips* decision does contain a statement much relied upon by Appellants which is as follows (pp. 596-597):

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process *if the opportunity given for the ultimate judicial determination of the liability is adequate.*" (Italics supplied.)

Appellants emphasize the first part of the sentence *only* but Mr. Justice Brandeis certainly intended both parts as the complete rule of law he was stating. In Appellee's case more than the value of the product actually seized is involved, Appellee's reputation, good will, and the reputation and good will of its product have received terrific irreparable injury from the punishing publicity of the carefully planned strategy of Appellants in making seizures in far flung places throughout the Nation. The trial in libel courts, as is discussed *supra* pages 93-105, is not an adequate remedy so the *Phillips* decision is not helpful to Appellants in defending against their arbitrary, oppressive and capricious action in this case.

The *Phillips* case cites and relies upon *Murray's Lessee* v. *Hoboken Land and Improvement Co., supra,* where the peculiar relationship of a Collector of Internal Revenue to his government was held to authorize the taking over of certain property of a collector delinquent in his accounts. In the *Hoboken* case, however, it is pointed out that under the remedies available to the collector a hearing could be had before the actual taking of the property in question. Mr. Justice Brandeis in the *Phillips* case says of the *Hoboken* case, "the underlying principle of that case was . . .

the need of the government promptly to secure its revenues" (p. 596).

The twelve cases cited by Appellant at the bottom of page 40 of its brief uniformly involve facts showing that the complaining party *in every instance* had an opportunity for a hearing before harm could come to him in any way. Those cases are not in point with the facts of the instant case for in those cases as in the rent, price, contract renegotiation and tax cases cited by Appellants there was a later hearing on the *very issue preliminarily determined.* Here there is never a hearing under the statute, if the court construes Appellants' actions as authorized thereby and adopts Appellant's construction thereof, on whether the Appellee's labeling was "in a material respect" misleading to the "injury or damage of the purchaser or consumer"—the issue in the 6 decisions authorizing multiple seizures. The later hearing Appellants want us to have under the Act in the libel courts would never involve an inquiry into Appellants' arbitrary, capricious and oppressive conduct in authorizing and using multiple seizures herein. The issue in the libel courts is solely whether our labeling is "misleading in any particular" (Sec. 301 of Act). On the issues before Appellants in making their six decisions authorizing multiple seizures, Appellants say no hearing can ever be held. Their conduct—they say—is beyond inquiry. But their cited cases do not hold this.

The interesting thing about Appellants' brief is its careful avoidance of a discussion of cases where this Court has considered due process and summary action under the police power. In *North American Cold Storage Company* v. *City of Chicago,* 211 U. S. 306 (cited only in a quotation from another case, p. 44, Appellants' brief), summary seizure of allegedly putrid, decayed, poisonous and infected poultry was sustained. The Court said at page 315:

> "We are of the opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for

use, is not necessary. The right to so seize is based upon the right and duty of the State to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten."

The Court concluded at page 320:

"As the owner of the food or its custodian is amply protected against the party seizing the food, who must in a subsequent action against him show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food . . . without a preliminary hearing."

Appellee of course has no such remedy of subsequent action for damages and advertising pamphlets used in the sale of 40% of Appellee's product (Finding 3, R. 757; Finding 42, R. 770) rather than putrid chickens are the subject matter of the instant case. The *Chicago* case offers no comfort to Appellants.

In the case of *Lawton* v. *Steele, supra,* the Court in a 6-3 decision sustained denial of recovery for the value of fish nets summarily destroyed *while admittedly being used in violation of a New York Statute.* The court based its decision upon the ground that the fish nets in question were "of trifling value" and said at p. 141 that the constitutional due process provisions "are intended for the protection of substantial rights of property." In his dissent Mr. Chief Justice Fuller in an opinion concurred in by Justices Field and Brewer said in part at page 144:

"The police power rests, upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of

law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard."

In *Sentell* v. *New Orleans & Carrollton Railroad Co.*, 166 U. S. 698, in sustaining an ordinance declaring dogs are not property, the Court said in part at page 705:

> "So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction."

The summary seizure decisions of this Court have therefore stated that in the absence of an emergency or a situation of compelling public necessity the due process clause requires a hearing before harm by governmental action.

In considering due process in non-emergency cases, and the instant case is certainly not an emergency case, this Court has laid down fundamental principles of procedural fairness which this statute violates if it authorizes Appellants actions herein. In *Turner* v. *Wade*, 254 U. S. 64 a Georgia statute allowed *ex parte* assessment of property. An appeal to a board of arbitration was allowed with one arbitrator to be appointed by the taxpayer, one by the Assessment Board and a third by the two so selected. If a majority of the arbitrators did not agree on a new assessment in ten days the assessment was to stand. The arbitrators agreed the assessment was excessive but could not agree upon a new assessment before the ten days expired. In holding the Act invalid because of this abortive inadequate remedy the Court said at page 70:

> ". . . we are forced to the conclusion that reading the provisions together, being parts of one and the same act, they clearly show that the Board of Assessors was not required to give any notice to the taxpayer, nor was the opportunity given him to be heard as of right before the assessment was finally made against him.

> But provision was made for notice of the assessment to the taxpayer after it was made, and in event of his dissatisfaction the arbitration was to afford a hearing to him. Such hearing was all that the statute contemplated that the taxpayer should have.
>
> . . . it follows that the assessment of the Board of Assessors ought to have been enjoined, because § 6 of the act, as construed and applied in this case, denies to the complaining taxpayer due process of law."

The hearing must always be held in time to be effective and it is a violation of due process if there is not an effective stay to prevent irreparable injury until the final decision. In the instant case it is obvious that unless a court can stop Appellants they are unstoppable as the statute provides no stay of further multiple seizures and the statutory remedy in the libel courts is clearly inadequate. (See *supra* pages 93-105.)

In *Southern Railway Co.* v. *Virginia*, 290 U. S. 190, a statute of Virginia authorized the *state highway commissioner* to require railroad companies to eliminate grade crossings and to substitute overhead crossings when "in his opinion" this was deemed necessary for the public safety and convenience. No notice or hearing on the existence of such necessity and no means of reviewing the officer's decision was set up in the statute. The Court held the statute unconstitutional as violative of the due process of law clause of the 14th Amendment, saying (p. 195):

> ". . . it (the statute) attempts to give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure."

See also *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134

U. S. 418; *Central of Georgia Railway Co.* v. *Wright*, 207 U. S. 127; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; and *Londoner* v. *Denver*, 210 U. S. 373.

The one overwhelming conclusion from all of the cases decided by this Court is that due process varies according to the factual situation before a governmental official—does he have a tax, an immigration, or an emergency public health situation requiring him to act? That is why it is all important that the facts surrounding a constitutional due process issue such as the one presented by this case be fully developed by evidence so that the Court can act in an informed manner.[127]

It is a fair conclusion from the decisions of this Court above cited that in the absence of an emergency of compelling public necessity a hearing before harm is essential to due process. Under the facts of the instant case no emergency of that character exists so if the acts of Appellants are in fact authorized by the words here attacked, those words violate that due process of law guaranteed by the due process clause of the Fifth Amendment.

Also, aside from the absence of an emergency, the decisions of this Court have never held that the arbitrary, capricious and oppressive conduct herein found to have been done by Appellants is due process of law.[128]

21. Errors Claimed by Appellants on Conduct of Trial, Admission of Evidence and Requiring Production of Documents, if Any, Do Not Warrant Reversal

They who denied us any hearing in most arbitrary fashion, now say that the Trial Court which gave them most of its time for nearly two weeks did not give them a fair hearing because of certain rulings, none of which affected the

[127] See cases cited *supra* note 5.

[128] We have not repeated herein the discussion *supra* pages 46-62, 81-93 on Appellants actions as a violation of due process, aside from the emergency.

ultimate result in this case. Appellee respectfully submits that an examination of the record herein reveals that error, if any, committed by the Court below was harmless and not such that the substantial rights of Appellants were prejudiced.

Much is sought to be made of the exercise of the discretion of the Court below in limiting the cross-examination of Dr. John A. Myers. On the contrary the record reveals that Appellants' cross-examination of Dr. John A. Myers was not limited until he had been under cross-examination for over five hours (his direct examination took about 50 minutes). During this time, counsel for Appellants not only covered the entire scope of Dr. Myers' direct examination but insisted upon going far-afield (see Record 92-183) and indulging in highly repetitious questioning, despite repeated warnings from the Court. It is evident in the record that the main purpose of the cross-examination was not only to exhaust a witness of unimpeachable professional standing but also to exhaust the patience of the Trial Court. The limitation of the cross-examination was within the sound discretion of the trial court and merits scant attention here. See *Glasser* v. *United States*, 315 U. S. 60, 83. Appellee would like to point out, however, that Appellants misstate the entire testimony of Dr. Myers. Dr. Myers did *not* testify that deficiency diseases did not cause death in the 40's and 50's. On the contrary, Dr. Myers testified that vitamin and mineral deficiencies were serious in the 40's and 50's and were responsible for cardiac collapse and sudden death (R. 133-134). The whole import of Dr. Myers' testimony was the need of an adequate supply of vitamins and minerals in order for the proper functioning of the body and to avoid the serious and widespread conditions which may follow deficiencies (R. 72-91). All the cross examination on all the "common diseases" and "common illnesses" and cures therefor referred to by Appellants had nothing to do with the pamphlets as

Dr. Myers said, in line with all the other credible testimony in the case, that Nutrilite is not represented in the pamphlets as a "cure" for any disease (R. 87).

Appellants' contentions regarding the limitation of cross-examination of Casselberry are also without merit. At no stage in his testimony did Casselberry testify that the booklets were not misleading. The quote given by Appellants on page 101 is erroneous as by now the Court can see so many of their references are. His only testimony as to the character of the booklets was to the effect that there is nothing in the booklet now used which he believed to be untrue (R. 51-52). For that matter no reason exists why he could not have given his opinion for what it is worth on whether the pamphlets were misleading. There can be no doubt what his opinion would be if given. He is a very well educated man (R. 32). And none of Appellants who gave such opinions are any better qualified than he to give such an opinion.

As for Appellants' so-called "offer of proof" it is evident from the remarks of the Court below and referred to by Appellants that the offer contained 77 questions. None of the questions said anything about the answer expected, and since the questions were to Appellee's President it can hardly be expected that the answers would be favorable to Appellants. In *Origet* v. *Hedden*, 185 U. S. 228, 235, the Court rejected a similar claim of error where there was "no explanation in the record as to what evidence plaintiff (Appellants) sought to elicit. No offer of proof was made, nor did the questions clearly admit of an answer favorable to plaintiff (Appellant) . . ." Also, the questions did not contain in most instances the type of question to which objections had been sustained previously, as the Court points out (R. 520-528). This was presented on the very eve of the close of the trial and a *week* after Counsel for Appellants had advised the court that he would embody the questions he proposed in an offer of proof. Needless to say, the offer

contained questions which were not of the type previously ruled upon by the Court below and represented questions that could have been asked Casselberry while he was on the stand. For the most part such offer was a collection of afterthoughts. It should be noted also that Appellants failed to make this offer of proof part of the record as they could have easily done by having it marked as an exhibit. Not being part of the record, it should not be considered on this appeal. *Cf. Palmer* v. *Hoffman*, 318 U. S. 109, 116.

Also, as Appellant's brief recognizes, the record clearly shows that all the Court ruled against was argumentative questions (R. 229-230, 232, which are not allowed in any Court. The "offer of Proof" was Appellants' Counsel's *own idea* (R. 232) not that of the Court, and the Court did *not* suggest it be in the form of questions without stating the answers Appellents expected to get. Yet, that is exactly what Appellant's offered (R. 520-528). The record shows that Appellants cross-examined Casselberry at great length (R. 183-222, 225-246) and said "no further questions" and does *not* show Casselberry was present when Appellants asked for permission to recall him to the stand for further cross-examination.

Appellants urge as error (p. 108 Brief) the action of "the court" in denying their motion to quash subpoenas *duces tecum*. Although Appellee believes no error was committed below in regard to the denial of the motion to quash, it believes an answer to Appellants' argument to be unnecessary in view of the fact that the motion was heard and denied by a single judge and at no time did Appellants seek to have his action reviewed by the full court. Section 2284, Title 28, USC which sets forth the composition and procedure before a special three-judge district court specifically provides in subsection 4:

> "The action of a single judge shall be reviewable by the full court at any time before final hearing."

Appellants failure to seek review of such order, if they deemed themselves prejudiced thereby, precludes their reliance upon it here. In no sense should denial of Appellant's motion to quash be considered action by the full Court. *Cf. Tapliff* v. *Tapliff*, 145 U. S. 156.

The refusal to quash subpoenas requiring Appellants to testify (see p. 108-109 of Appellant's brief) is of like status. They did not appeal the single judge's ruling to the full Court. Also, in reading in Kingsley's deposition which is the only place such an objection appears in the record, Appellant's expressly and specifically waived this and all the other objections they made of this character (R. 506-508). They can hardly rely now upon objections thus expressly waived.

In reply to the assigned error as to the rejection by the court below of Defendants' Exhibit 26 (Brief p. 103), Appellee submits that the offered evidence was totally irrelevant and immaterial to the issues involved. Appellee does not claim or assert that vitamin and mineral deficiencies *as such* are primary causes of death in any group. Appellee does contend, however, as supported by the medical testimony below, that vitamin and mineral deficiencies are significant in the incidence of diseases since those who receive sufficient vitamins and minerals are naturally better able to resist sickness (R. 133-134, 137-139, 362). Defendants' Exhibit 26 was further objectionable on the ground that it was hearsay. While there may not have been any reason for those who compiled the publication to falsify, the death reports themselves do not seem to have any special guaranty of reliability to take a compilation of the same out of the hearsay rule. It is obvious that in many instances those reporting the causes of death are incompetent from a professional viewpoint to diagnose the same and they merely follow a questionable form in listing causes (R. 139, 141). In other instances, there may well have been reason to falsify. Appellants offered no evidence to con-

tradict Dr. Myers' testimony that death report forms from which Exhibit No. 26 was compiled are not a reliable source on causes of death (R. 139-141). The offered exhibit was also merely cumulative and error, if any, in rejecting the same was not prejudicial. (See Defendants' Exhibit 25, R. 1543-1561, 529).

Appellants also assign as error (p. 104) the rejection of a medical publication entitled "Deficiency Diseases in the Cincinnati Hospital—A Ten Year Study" offered through its author, M. A. Blankenhorn (R. 425). It should be pointed out that this article was offered for the *truth* of its contents (R. 426). Yet the author testified that the report was not based on his personal investigations or knowledge (R. 425, 428). Appellants' objection to the same as hearsay was thus properly sustained (R. 425-426). Furthermore, it should be pointed out that Blankenhorn subsequently testified to the results which were the basis for the offered study (R. 428-429). Thus, the exclusion, even if erroneous, should not be grounds for reversal where the contents of such evidence are proved by other testimony. *Matheson* v. *United States*, 227 U. S. 540; *Drumm-Flato Commission* v. *Edmisson*, 208 U. S. 534. Appellant's claim this ruling is inconsistent with the admission "not to show the truth of it but to show our entire good faith in that our pamphlets and these books say the same thing" of Appellee's Exhibit No. 6 (R. 957-979, 50). Exhibit 6 contains statements by the experts in the field of vitamins and minerals on some of which Appellee relied in writing its pamphlets (R. 217) and unlike Defendants' exhibit it was not offered to prove the truth of facts but only on the issue of good faith to show the existence of such literature.

Appellants also seek reversal on the basis of certain evidence offered by Appellee and admitted by the Court. In one instance referred to on page 102-103 the Appellants' statement contains its own death knell because the objection was one that could obviously have been corrected if the

objection had been made when the deposition was taken.[129] Obviously Appellants are again misstating the Record because at pages 259 and 260 the Court three times sustained objections made by Appellants during the reading in Court of the very deposition to which objections had not been made when the deposition was given. The Appellant's claim of error (pp. 105, 106) in receiving opinions on the impression of the booklet on the consuming public is without merit. Dr. Myers testified only as to his impression as a medical doctor (R. 85). Lee J. Myers testified only as to his legal opinion (R. 528). Crawford most certainly was allowed to put into evidence his opinion that the pamphlet is or would be misleading in a material respect to the injury or damage of the purchaser or consumer (R. 333). The Court would not let him give medical opinions or symptoms as he is not a doctor, but that is all he was stopped from doing (R. 382-383).

The other assignments of error are so lacking in merit on the Record herein and so obviously a misstatement of the Record as not to warrant discussion.

Appellee submits that in view of the fact that this case was tried by a court and not by a jury, the strict rules regarding prejudicial evidence are not applicable. This Court has often stressed that where a district court decides both the facts and the law, the admission of improper evidence is not ground for reversal where there is sufficient other evidence upon which to base the decision. *Field* v. *United States,* 34 U. S. 182 and *Mammouth Mining Co.* v. *Salt Lake Foundry & Machine Co.,* 151 U. S. 447.

Appellants, throughout their discussion of the alleged errors committed below, have not carried the burden of showing that prejudice resulted or that the substantial rights of Appellants were affected—even if it be assumed

[129] Appellant's failure in this regard is important since such objections could have been obviated during the course of the deposition. See Rule 32(c)(1) of the Federal Rules of Civil Procedure.

that the rulings were erroneous. At most the errors, if any, were "harmless" and not grounds for reversal. 40 Stat. 1181, c. 48, 28 U.S.C. § 391 and *Palmer* v. *Hoffman, supra,* at page 116.

As noted by this Court in *Glasser* v. *United States, supra,* this Court should guard against magnification of events and occurrences which were of little importance in the actual setting of the trial below.

22. Conclusion

For the above reasons the judgment below should be affirmed.

Respectfully submitted,

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